TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 138

JOSEPH F. MILLER, PETITIONER

vs.

A. C. ADERHOLD, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 6, 1932
CERTIORARI GRANTED DECEMBER 5, 1932

SUPREME COURT OF THE UNITED STATES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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1 [Caption omitted.]

2–3 [Not printed.]

4 In United States District Court, Northern District of Georgia, Atlanta Division

UNITED STATES OF AMERICA, IN THE RELATION OF JOSEPH F. MILLER, relator

vs.

ARTHUR C. ADERHOLD, AS WARDEN, UNITED STATES PENITENTIARY, Atlanta, Georgia, respondent

Petitioner for writ of habeas corpus

To the Hon. UNITED STATES DISTRICT JUDGE FOR THE DISTRICT AFORESAID:

Petitioner for his petition herein to this honorable court respectfully shows and alleges:

1. He is a citizen of the United States, and of the city of New York.

2. He is at present imprisoned involuntarily by Arthur C. Aderhold as warden of the United States penitentiary at Atlanta, Georgia, and within the jurisdiction of this court, and said imprisonment petitioner claims on information and belief to be illegal.

3. The pretext for the detention is a commitment issued out of the United States District Court for the Southern District of New York on June 17, 1931, committing this petitioner to four years in the penitentiary upon a judgment of said court entered the 17th day of June, 1931; and it is respectfully submitted that this judgment was illegal and void for lack of jurisdiction of the sentencing in court for the following reasons, to wit:

5 The petitioner, after having been indicted for stealing from the United States mails on or about August 27th, 1928, was arraigned in said court on September 10th, 1930, and plead guilty, whereupon sentence was suspended and an order entered discharging him from the custody of the United States marshal. Copy of this order is attached hereto and made a part hereof, marked "Exhibit A."

On June 17, 1931, the petitioner was rearrested, brought before the court, and without a hearing and without the advice of counsel was resentenced by another judge, and the commitment referred to was prepared and delivered to the United States marshal. Copy of the commitment is attached hereto and made a part hereof, marked "Exhibit B."

A copy of the docket entries of the United States District Court for the Southern District of New York is attached hereto and made a part hereof, marked "Exhibit C."

4. A motion to vacate the alleged illegal sentence was made in the United States District Court for the Southern District of New York on October 27th, 1931, before Judge Goddard who passed the sentence alleged to be illegal, and the said judge denied the motion.

The petition is made because of counsel's doubt of appealability of the order denying the motion to set aside the judgment, after the time for appeal from that judgment had already expired.

Therefore, petitioner prays that a writ of habeus corpus issue out of this court commanding the respondent herein to bring this petitioner into court and for his speedy discharge if it be found that his detention be illegal.

JOSEPH F. MILLER,
Petitioner.

6 STATE OF GEORGIA,
County of Fulton, ss:

Joseph F. Miller, being duly sworn, deposes and says:

That he is the petitioner herein; that this petition is true to the best of his knowledge, information, and belief, and in substance.

Petitioner further says that he is a citizen of the United States and of the State of New York; that by reason of poverty, he is unable to pay the clerk's and marshal's fees on this application, and that he is advised and verily believes that he has a good cause of action for the relief requested in the foregoing petition.

Wherefore, he asks this court for leave to proceed herein as a poor person under the provisions of title 28, United States court.

JOSEPH F. MILLER.

Sworn to before me this 10th day of November, 1931.

[NOTARIAL SEAL.] H. F. FRICK,
Notary Public, Georgia, Fulton Co.

Commission expires June 29, 1935.

7 *Exhibit A to petition*

At a stated term of the United States District Court for the Southern District of New York, held at the United States court room in the borough of Manhattan, city of New York, on Dec. 10, 1930

Present: The Honorable Frank J. Coleman, judge.

The United States vs. Joseph F. Miller. C58–392. U. S. Criminal Code, Sec. —. Stealing from U. S. mails

Deft. pleads guilty; sentence suspended.

Ordered that the prisoner be discharged from the custody of the U. S. marshal.

An extract from the minutes.

[SEAL.] (Signed) CHARLES WEISER,
Clerk.

8 *Exhibit B to petition*

At a stated term of the United States District Court for the Southern District of New York, held at the United States court room in the borough of Manhattan, city of New York, on Jun. 17, 1931

Present: The honorable Henry W. Goddard, judge.

The United States vs. Joseph F. Miller. C58-392. U. S. Criminal Code, Sec. 194 U. S. C. C. Stealing from the U. S. mails

On motion of the United States attorney, ordered sentenced.

The court thereupon proceeded to pass judgment, and sentenced the prisoner to be imprisoned for a term of four (4) years. Sentence to be executed at the U. S. penitentiary, Atlanta, Ga. Sentenced to date from June 17, 1931.

An extract from the minutes.

[SEAL.] (Signed) CHARLES WEISER,
Clerk.

9 *Exhibit C to petition*

Title of case: The United States vs. Joseph F. Miller. Violation of 392. Stealing from the U. S. Mails. Sec. 194, U. S. C. C.
Attorney for defendant: ——— ———.

Date	Proceedings	No. of words	Clerk's fees	
			Pltf.	Defendt.
Mo. Day Year				
Aug. 27, 1928	Filed indictment		5. 00	
Sep. 4, 1928	Adjd. to Sept. 10th, 1928	5		
Mar. 13, 1930	Filed bench warrant with marshal's return; def. not apprehended. 3/13/30.			
Dec. 10, 1930	Pleads guilty; sentence suspd. Coleman, J.			
Dec. 15, 1930	Filed order of removal from northern district of New York to southern district of New York.			
Dec. 15, 1930	Filed bench warrant			
Dec. 15, 1930	" discharge from custody of U. S. marshal.			
June 17, 1931	P. G.; sentenced to four years U. S. penitentiary, Atlanta, Ga., Goddard, J.			
June 17, 1931	Issued commitment & duplicate			
July 27, 1931	File commitment & entered return. Defendant delivered to the U. S. pen., Atla., Ga. 7/13/31.			

10 In United States District Court

Order for writ to issue in forma pauperis

Filed Nov. 12, 1931

Read and considered. Let the writ issue in forma pauperis, returnable before me at Atlanta, Georgia, on Friday, November 13th, 1931, at 10.00 o'clock a. m.

This November 12th, 1931.

E. MARVIN UNDERWOOD,
U. S. Judge.

In United States District Court

Order dismissing writ of habeas corpus and remanding petitioner to custody

Filed Dec. 12, 1931

The above-entitled proceeding coming on for hearing before me, and after hearing thereon, it is considered, ordered, and adjudged that said writ of habeas corpus be and the same is hereby dismissed, and it is further ordered that the petitioner be remanded to the custody of respondent.

This 12th day of December, 1931.

E. MARVIN UNDERWOOD,
United States Judge.

11 In United States District Court

Response

Now comes the respondent in the above-entitled proceeding and in obedience to said writ, produces the body of the petitioner at the time and place directed therein, and for cause of the detention respectfully shows that he holds the petitioner under and by virtue of a commitment issued by the District Court of the United States for the Southern District of New York, dated the 17th day of June, 1931, a copy of which is hereto attached and made a part of this response.

Wherefore, having fully answered, respondent prays the judgment of the court in the premises.

HAL LINDSAY,
Assistant United States Attorney,
Attorney for Respondent.

Duly sworn to by A. C. Aderhold. Jurat omitted in printing.
(NOTE: Exhibit omitted. Same appears on page 8.)

12 In United States District Court

Notice of appeal

Please take notice that the above-named relator hereby appeals from the order of the court discharging the writ of habeas corpus previously granted and every part of such order entered the 12th day of December, 1931, to the United States Circuit Court of Appeals for the Fifth Circuit.

Dated at Atlanta, Ga., this 24th day of December, 1931.

JOSEPH F. MILLER,
Relator-Appellant.

Office and P. O. address: United States penitentiary, Atlanta, Ga.

To: The clerk of this court.
The United States attorney for this district.

In United States District Court

Order allowing appeal

Filed Jan. 1, 1932

The appeal so taken is hereby allowed and appellant is allowed to prosecute said appeal in forma pauperis.

Atlanta, Ga., January 1st, 1932.

E. MARVIN UNDERWOOD,
U. S. Judge.

13 In United States District Court

Assignment of errors

Filed Jan. 1, 1932

The court erred in discharging the writ of habeas corpus because the sentencing court lacked jurisdiction to sentence the relator to imprisonment after his discharge by Judge Coleman.

The court erred in discharging the writ of habeas corpus because the relator was illegally detained, and the writ should have been sustained.

JOSEPH F. MILLER,
Relator-Appellant.

In United States District Court

Affidavit of pauper

Filed Jan. 1, 1932

COUNTY OF FULTON,
State of Ga., ss:

Joseph F. Miller, being duly sworn according to law deposes and says that he is the petitioner in the above-entitled action; that he is a citizen of the United States, and that because of his poverty he is unable to pay the costs of said action or to give security therefor.

JOSEPH F. MILLER.

Sworn to and subscribed before me this 21st day of December, 1931.

[NOTARIAL SEAL.] FRANK S. GRAHAM,
Notary Public.

14 In United States District Court

Praecipe for transcript of record

Filed Jan. 1, 1932

The clerk will prepare the record, as follows:

1. Petition for habeas corpus.
2. Return of respondent, or motion to dismiss.
3. Order denying writ of habeas corpus, and opinion if any.
4. Notice of appeal, assignment of errors, affidavit of poverty, and allowance of appeal and of proceeding in forma pauperis.
5. If customary in this district, a writ of habeas corpus with return endorsed thereon, and citation with admission of service; or in lieu thereof suitable mention in the record.
6. Such other and further papers as the respondent should designate.

The clerk will kindly file the record with the clerk of the United States circuit court, together with the appearance of the appellant.

Dated at Atlanta, Ga., December 24th, 1931.

JOSEPH F. MILLER,
Appellant in person.

15 NOTE RE CITATION: Original citation omitted from the record, the original thereof being on file in the office of the clerk of the U. S. Circuit Court of Appeals.

[Clerk's certificate to foregoing transcript omitted in printing.]

16 [Minute entry of argument and submission, Feb. 17, 1932, omitted in printing.]

17 In United States Circuit Court of Appeals for the Fifth Circuit

No. 6470

JOSEPH F. MILLER, APPELLANT

versus

A. C. ADERHOLD, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, Georgia, appellee

in forma pauperis

Appeal from the District Court of the United States for the Northern District of Georgia

(February 20, 1932)

Before Bryan, Foster, and Walker, circuit judges

Opinion of the court

Filed February 20, 1932

By the court. Appellant pleaded guilty to an indictment charging him with stealing mail matter, in violation of §194 of the Criminal Code, 18 U.S.C.A. §317. The district judge who received the plea suspended sentence indefinitely, but some six months later another judge of the same district court imposed a sentence of four years in the Atlanta Penitentiary. This appeal is taken from an order dismissing a writ of habeas corpus previously issued, and remanding appellant to custody.

18 The order indefinitely and unconditionally suspending the imposition of sentence was void. Ex parte United States, 242 U. S. 27. A judge of the trial court had authority, notwithstanding the attempted suspension, to impose sentence and to order that appellant be committed to the penitentiary. United States, ex rel. Campbell v. Bishop, 47 F. (2) 95.

The judgment is affirmed.

A true copy.

Teste:

_____,

Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

19 In United States Circuit Court of Appeals

No. 6470

JOSEPH F. MILLER

versus

A. C. ADERHOLD, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, Georgia

Judgment

Feb. 20, 1932

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Georgia, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said district court in this cause be, and the same is hereby affirmed.

20 *Petition for rehearing*

Filed March 9th, 1932

In United States Circuit Court of Appeals for the Fifth Circuit

[File endorsements omitted.]
[Title omitted.]

Application for rehearing and/or Motion to Certify Questions to the Supreme Court of the United States

(Filed March 9, 1932)

The appellant hereby applies for rehearing upon the ground that in its opinion of February 20th, 1932, this honorable court seems to have overlooked that the case of Ex parte United States, 242 U. S. 27, was decided in 1916, nine years before the enactment of section 724 of title 18, U. S. C. A., which specifically gives the district courts power which in 1916 they did not have," to suspend the imposition or execution of sentence."

Since the district judges now have the power to suspend the imposition of sentence, the order indefinitely and unconditionally suspending the imposition of sentence was valid, and thereupon the court lost jurisdiction of the defendant. Grundel vs. People, 33 Colo. 191, 192; 79 P. 1022.

The case of Campbell v. Bishop, 47 Fed. 2nd 95, is also not in point. In that case a definite sentence was imposed, but execution was suspended, and upon violation of parole terms, suspension of execution was revoked.

Unless this court wishes to hold that a district court may not lawfully suspend imposition of sentence without placing the defendant upon probation—a holding wholly unwarranted by the langauge of the statutes—its previous opinion and decision herein should be recalled.

21 Section 724 of title 18 is unambiguous. That section was enacted to permit Federal judges to suspend sentence. We repeat from appellant's original brief:

"It is true that before the enactment of section 724 mandamus proceedings, if brought in proper time, would have resulted in an order compelling the judge to revoke the invalid suspension and impose sentence, but, since the enactment of the statute, the court had an absolute right to suspend sentence without the imposition of terms or conditions. No mandamus proceedings would lie against him. Such suspension without the imposition of terms or conditions operated as a complete discharge."

The case at bar is of great importance to the appellant, but of still greater importance to the entire Federal judiciary, as was the case of United States vs. Benz, 51 S. Ct. 113, which reached the Supreme Court on a very similar question on certification from the Third Circuit Court.

With the importance of the issue, and the uncertainty of certiorari proceedings in view, it is most respectfully suggested and moved that upon this rehearing this court certify the question involved to the Supreme Court for aid in its determination. The following question is respectfully suggested:

1. Has a United States district judge power indefinitely and unconditionally to suspend the imposition of a sentence upon conviction of defendant for a crime?

2. If the answer is "yes," does the court thereafter retain jurisdiction to recall the convicted person and to impose a definite term?

All of which is respectfully submitted.

JOSEPH F. MILLER,
Appellant in person.

HORACE G. MARKS,
WILLIAM MATTHEWS
Of the New York Bar,
Of counsel for appellant.

22 In United States Circuit Court of Appeals

[Title omitted.]

Order denying rehearing

(March 11, 1932)

It is ordered by the court that the petition for rehearing in this cause be, and the same is hereby denied.

23 [Clerk's certificate to foregoing transcript omitted in printing.]

[Endorsement on cover:] Enter Joseph F. Miller, pro se. In forma pauperis. File No. 36,835. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 138. Joseph F. Miller, petitioner, vs. A. C. Aderhold, warden, United States penitentiary, Atlanta, Georgia. Petition for a writ of certiorari and exhibit thereto. Filed June 6, 1932. File No. 36835.

U. S. GOVERNMENT PRINTING OFFICE 1932

Supreme Court of the United States

Order allowing certiorari

Filed December 5, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted, and the case is assigned for argument on Monday, January 9th next.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office Supreme Court
FILED
JUN 6 1933
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 138

JOSEPH F. MILLER, PETITIONER,

vs.

A. C. ADERHOLD, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JOSEPH F. MILLER,
Petitioner, Pro se.

Post Office Box 1733, Atlanta, Georgia.

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Statutes Cited.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 138

JOSEPH F. MILLER, PETITIONER,

vs.

A. C. ADERHOLD, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Joseph F. Miller, petitioner herein, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit in the above entitled cause entered February 20, 1932 (56 Fed. (2) 152), and rehearing denied March 11th, 1932 (not yet reported).

Jurisdiction.

The judgment of the United States Circuit Court of Appeals was entered February 20th, 1932 (R. 8). A

petition for rehearing was denied March 11th, 1932 (R. 10-19, not yet reported).

This petition for certiorari is filed with this Honorable Court within the time provided by statute and petitioner invokes the jurisdiction of this Court under the provisions of the Act of February 13th, 1925.

Questions Presented.

This petition for certiorari presents but two questions:

Has a United States District Judge power, authority, and jurisdiction to indefinitely and unconditionally to suspend the imposition of sentence upon conviction of a defendant for violation of a law involving crime?

Does the United States District Court after the suspension of said sentence and after said term of Court had expired retain jurisdiction to recall the convicted person and to impose a definite sentence?

The Statute Involved.

The pertinent provisions of the Probation Act, Section 724 U. S. C. A. Title 18, reads in whole as follows:

> "The courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia, when it shall appear to the satisfaction of the court that the ends of justice and the best interest of the public, as well as the defendant, will be subserved thereby, shall have power, after conviction or after a plea of guilty or *nolo contendere* for any crime or offense not punishable by death or life imprisonment, to suspend the imposi-

tion or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best: or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or modify any condition of probation, or may change the period of probation. The period of probation together with any extension thereof, shall not exceed five years."

STATEMENT

The case originated in the District Court of the United States for the Southern District of New York. The petitioner, Joseph F. Miller, was indicted for larceny from the mails under Title 18, Section 317, U. S. C. A. He entered a plea of guilty for the offense charged therein on December 10th, 1930, and the Court made an order suspending the sentence, and ordered the discharge of the petitioner from the custody of the United States Marshal (R. 2-4).

On June 17th, 1931, petitioner was again brought into court and was sentenced by a different Judge to be imprisoned at and in the United States Penitentiary at Atlanta, Georgia, for a term and period of four years from and including the 17th day of June, 1931.

The petitioner thereafter was committed to the United States Penitentiary at Atlanta, Georgia, and on December 12th, 1931, filed a petition in *forma pauperis* for a writ of *habeas corpus* in the United States District Court for the Northern District of Georgia, Atlanta Division thereof. Such writ of *habeas corpus*

was dismissed and petitioner remanded to the custody of the Warden (R. 4).

That within the time provided for appeals petitioner filed his notice of appeal (R. 5) which appeal was duly allowed by the Court (R. 5). And thereafter and on February 20th, 1932, the United States Circuit Court of Appeals, Fifth Circuit, filed an opinion (R. 7) affirming the judgment and order of the lower court. And thereafter, and on the 9th day of March, 1932, petitioner filed with the United States Circuit Court of Appeals, Fifth Circuit, a petition for rehearing or motion to certify questions to this Court; and thereafter, on March 11th, 1932, the United States Circuit Court of Appeals made an order denying rehearing (R. 10).

Reasons for the Allowance of Writ.

There is a distinct conflict between the opinion of the United States Circuit Court of Appeals for the Fifth Circuit rendered herein and of the opinions rendered in the cases of *Mintie* v. *Biddle*, 15 Fed. (2) 933; *United States* v. *Maisel*, 26 Fed. (2) 275; *Riggs* v. *United States*, 14 Fed. (2) 9; *United States* v. *Wilson*, 46 Fed. 748; *United States* v. *Murray*, 275 U. S. 353; *Ex parte United States*, 242 U. S. 27, and the case of *United States, ex Rel. Campbell* v. *Bishop*, 47 Fed. (2) 95.

For the foregoing two reasons, particularly the first, this petition should be granted. Upon this Honorable Court's interpretation of the probation act depend the liberty of hundreds in the future.

The fundamental rights of petitioner and others have been affected by grave errors of law involving the imposition of sentence after sentence has been definitely suspended.

WHEREFORE, the premises considered, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case of *Joseph F. Miller* v. *A. C. Aderhold,* Warden, United States Penitentiary, Atlanta, Georgia, numbered 6470, and that the said judgment of the United States Circuit Court of Appeals for the Fifth Circuit may be reversed, and petitioner be ordered released from further confinement at the United States Penitentiary at Atlanta, Georgia; and for such other relief as to the Court may seem meet and proper in the premises.

JOSEPH F. MILLER, *Pro se.*

Post Office Box 1733, *Atlanta, Georgia.*

ARGUMENT.

The petition raises two questions as to which the decision below is in conflict with the ruling of this Court in the case of *United States* v. *Murray*, 275 U. S. 353; and *Ex parte United States*, 242 U. S. 27, and in conflict with the ruling made by the United States Circuit Court of Appeals in *Mintie* v. *Biddle* (8 C. C. A.), 15 Fed. (2) 933.

In the affirmance of the judgment of the court below the United States Circuit Court of Appeals, Fifth Circuit, relies on the case of *Ex parte United States*, 242 U. S. 27, and the case of *United States ex rel. Campbell* v. *Bishop, Morale Officer*, 47 Fed. (2) 95, 96, 97. The Honorable United States Circuit Court of Appeals, Fifth Circuit, has overlooked the fact that the case of *Ex parte United States*, 242 U. S. 27, was decided by this Honorable Court in 1916.

That since that opinion Section 724, Title 18, U. S. C. A., was enacted by Congress on March 4th, 1925, which awarded the United States District Courts the power which they previously did not have "TO SUSPEND THE IMPOSITION OR EXECUTION OF SENTENCE".

The case of *Campbell* v. *Bishop, Morale Officer*, 47 Fed. (2) 95, is not in point. In that case a definite sentence was imposed but execution was suspended, and upon violation of the terms of parole or probation, suspension of execution was suspended.

In the case of petitioner the United States District Court for the Southern District of New York suspended the sentence indefinitely and did not place

petitioner on probation. He pleaded guilty for stealing from the mails (Title 18, Sec. 317, U. S. C. A.). On December 10th, 1930, the following entry was made on the docket of the Court:

> "December 10th, 1930, pleads guilty. Sentence Suspd. Coleman, J." (R. 2.)

Petitioner was accordingly discharged from the custody of the United States Marshal (R. 2).

That thereafter, on June 17th, 1931, after several terms of the Court had passed, petitioner was brought before the Court, and without a hearing and without the advice of counsel, was re-sentenced by another judge. The record shows that on such date the following docket entry was made:

> "June 17, 1931. P. G. Sentenced to four years U. S. Penitentiary, Atlanta, Georgia. Goddard, J." (R. 3.)

Section 178, Title 28, U. S. C. A., provides:

> "Terms of the District Court for the Southern District of New York shall be held at New York City on the first Tuesday in each month."

Therefore it will be seen that six terms expired between the indefinite suspension of sentence by Judge Coleman on the tenth day of December, 1930, and the imposition of sentence of four years' imprisonment in the penitentiary by Judge Goddard on June 17th, 1931.

The proposition is whether, after one judge indefinitely and unconditionally suspends sentence, another

judge of the same court has power, six months, or six terms later, and without a proper hearing, to revoke the suspension and sentence an accused to confinement in a United States penitentiary. Under the provisions of the probation statute, Section 724, Title 18, U. S. C. A., it is the duty of the court to fix definitely the period of probation; not, however, to exceed five years. Unless a defendant is informed as to the period of time during which he is to remain on probation, the probation might actually work greater hardship than a definite term in the penitentiary, as was illustrated in the case of *Mintie* v. *Biddle* (8 C. C. A.) 933. That court said:

> "Obviously, the matter of the furtherance of the administration of justice is not a unilateral one. The accused is due some modicum of consideration. It is not alone the ends and accommodation of the government which are to be considered and subserved; but those of the defendant as well. Held thus in suspension indefinitely and for a period which turned out to be thirty-four months, defendant could, in the interim, make no plans, enter into no contracts, engage in no permanent occupation, and bind himself to no obligations, or create any permanent ties, business or domestic."

The petitioner is entitled to be informed as to the period of probation for the further reason that if he conducted himself as a law abiding citizen, he has the right, at the end of the fixed period, to have further proceedings against him dismissed.

See *United States* v. *Maisel,* 26 Fed. (2) 275.

Unless the period of probation is fixed, therefore, the defendant is robbed of the incentive to conduct himself properly, with the hope that further proceedings will be dismissed at the end of the probation period.

See *Riggs* v. *United States,* 14 Fed. (2) 9.

The probation Act avers that the court shall "place the defendant upon probation *for such period and upon such terms and conditions* as it may deem best." And specifically by Section 727, Title 18, U. S. C. A., it is provided:

> "The probation officer shall furnish to each person released on probation under his supervision a *written statement of the conditions of probation* and shall instruct him regarding the same."

This Honorable Court in the case of *United States* v. *Murray,* 275 U. S. at page 353, said:

> "Its subsequent sections provide for appointment of one or more suitable persons to serve as probation officers and for their compensation and expense, and *make it the duty* of the probation officer to furnish to the person released a written statement of the *conditions of probation.*"

The petitioner herein was certainly entitled to be advised as to the course of conduct he is to pursue during the period of probation. A fair reading of the probation Act discloses the intention of Congress that the probation can only be revoked by the court when the defendant has broken the conditions upon which he

was placed on probation. In the case at bar, Judge Coleman, on December 10th, 1930, indefinitely and unconditionally suspended the sentence. He did not designate any condition nor did his honor attempt to fix a specific period during which the sentence would remain suspended, as contemplated and required by the probation Act.

As aforesaid, Honorable Judge Henry W. Goddard, on June 17th, 1931, six months after the original suspension of sentence and release of petitioner from custody, imposed a sentence of four years imprisonment, without any proof of petitioner's bad conduct and without awarding petitioner an opportunity to prove his good conduct and behavior as a law abiding citizen in the community in which he resided.

Could the court six terms after the unconditional and indefinite suspension of the sentence on December 10th, 1930, revoke the sentence and impose a definite sentence?

In this case the court indefinitely and unconditionally suspended the sentence and could not six terms thereafter revoke such order and proceed to judgment by sentencing petitioner to confinement at and in the United States Penitentiary at Atlanta, Georgia.

Wherefore it is respectfully submitted that this Honorable Court award certiorari and your petitioner be ordered released from his present unlawful confinement.

Respectfully submitted.

JOSEPH F. MILLER,
Pro Se.

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CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932

No. 138

JOSEPH F. MILLER, PETITIONER,

vs.

A. C. ADERHOLD, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PETITIONER.

DEAN G. ACHESON,
Counsel for Petitioner.

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Best, "*Crime and the Criminal Law in the United States*" (New York, 1930), c. LIV, pp. 506-507..... 23
Cantor, "*Crime—Criminals and Criminal Justice*" (New York, 1932), c. XX, p. 335..... 23
Chute, "*The Development of Probation in the Federal Courts*", Year Book, National Probation Ass'n, 1929, pp. 217-224..... 23
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SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1932

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PETITIONER.

Opinions Below.

No opinion was rendered by the District Court. The *per curiam* opinion of the Circuit Court of Appeals (R. 7) is reported in 56 F. (2d) 152.

Jurisdiction.

The judgment of the Circuit Court of Appeals, affirming an order of the District Court for the Northern

District of Georgia dismissing a writ of *habeas corpus*, was entered February 20, 1932 (R. 8). A petition for rehearing was denied March 11, 1932 (R. 10). The petition for certiorari was filed June 6, 1932, and was granted December 5, 1932. The jurisdiction of this Court rests on Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Statement.

Petitioner was indicted in the Southern District of New York for violation of Section 194 of the Criminal Code, stealing from the United States mails. On December 10, 1930, he was arraigned before Judge Coleman and pleaded guilty.

The clerk of the court at that time prepared and issued the following formal order (R. 2):

> "At a stated term of the United States District Court for the Southern District of New York, held at the United States court room in the borough of Manhattan, city of New York, on Dec. 10, 1930.
>
> Present: The Honorable Frank J. Coleman, judge.
>
> The United States *vs.* Joseph F. Miller, C58-392. U. S. Criminal Code, Sec. —. Stealing from U. S. mails.
>
> Deft. pleads guilty; sentence suspended.
>
> Ordered that the prisoner be discharged from the custody of the U. S. marshal.
>
> An extract from the minutes.
>
> (Signed) CHARLES WEISER,
>
> [SEAL.] *Clerk.*"

At a Stated Term of the UNITED STATES DISTRICT COURT, for the Southern District of New York, held at the United States Court Room, in the Borough of Manhattan, City of New York, on DEC 10 1930

PRESENT:

The Honorable FRANK J. COLEMAN
Judge.

THE UNITED STATES

C 8-39

vs

Joseph F. Miller

U. S. Criminal Code, Sec.

stealing from U. S. mails

Deft pleads guilty Sentence Suspended.

ORDERED that the prisoner be Discharged from the custody of the U. S. Marshal.

An extract from the minutes.

36021

Clerk

A photostatic copy of this order is inserted here.

The docket shows the following entry for the same day (R. 3):

> "Dec. 10, 1930—Pleads guilty; sentence suspd.
> Coleman, J."

Petitioner was discharged from the custody of the marshal, in obedience to the above order, as is indicated by a docket entry of December 15, 1930 (R. 3), as follows:

> "Dec. 15, 1930—Filed discharge from custody of U. S. marshal."

That he was so discharged may also be inferred from the fact that he was re-arrested on June 17, 1931 (R. 1). On that day petitioner was "brought before the court, and without a hearing and without the advice of counsel" was sentenced by another judge (R. 1). The following order of sentence and commitment was prepared by the clerk (R. 3):

> "At a stated term of the United States District Court for the Southern District of New York, held at the United States court room in the borough of Manhattan, city of New York, on June 17, 1931.
>
> Present: The Honorable Henry W. Goddard, judge.
>
> The United States *vs.* Joseph F. Miller, C58-392. U. S. Criminal Code, Sec. 194 U. S. C. C. Stealing from the U. S. mails.

On motion of the United States attorney, ordered sentenced.

The court thereupon proceeded to pass judgment, and sentenced the prisoner to be imprisoned for a term of four (4) years. Sentence to be executed at the U. S. penitentiary, Atlanta, Ga. Sentenced to date from June 17, 1931.

An extract from the minutes.

(Signed) CHARLES WEISER,

[SEAL.] *Clerk.*"

A photostatic copy of this order is inserted here.

On the same day the following entries were made in the docket (R. 3):

"June 17, 1931—P. G.; sentenced to four years U. S. penitentiary, Atlanta, Ga., Goddard, J.

"June 17, 1931—Issued commitment and duplicate."

The term of the District Court at which the plea of gulity was made and the order suspending the imposition of sentence and discharging the prisoner entered, began on December 2, 1930, and together with all extensions thereof ended on March 10, 1931. U. S. C. Title 28, Sec. 178; General Rule 6 of U. S. D. C. S. D., N. Y.

On November 12, 1931, petitioner filed a petition for a writ of *habeas corpus* in the District Court for the Northern District of Georgia (R. 4), and a writ issued directed to respondent, the warden of the Atlanta peni-

At a Stated Term of the UNITED STATES DISTRICT COURT.
for the Southern District of New York, held
at the United States Court Room, in the Borough
of Manhattan, City of New York, on JUN 17 1931

PRESENT:

The Honorable HENRY W GODDARD
Judge.

C58-392.

THE UNITED STATES : U.S.Criminal Code,
: Sec. 194 U.S.C.C.
vs : Stealing from the
: U.S.Mails
Joseph F. Miller, :

On motion of the United States Attorney, Ordered Sentenced.

The Court thereupon proceeded to pass judgment, and sentenced the Prisoner to be imprisoned for a term of

FOUR (4) YEARS

~~and to pay a fine of~~

~~and to stand committed until fine be paid or he is otherwise dis-~~
~~charged according to law.~~

Sentence to be executed at the **U.S.Penitentiary, Atlanta, Ga.**

Sentenced to date from June 17, 1931

An extract from the minutes.

Charles Urner

Clerk.

57364

tentiary. On December 12, 1931, the writ was dismissed and petitioner ordered remanded (R. 4). On appeal, this judgment was affirmed *per curiam* by the Circuit Court of Appeals for the Fifth Circuit (R. 7-8, 56 F. (2d) 152).

Specification of Errors.

1. The Circuit Court of Appeals erred in holding that a judge of the District Court for the Southern District of New York had jurisdiction, following an indefinite suspension of sentence and unconditional discharge of petitioner in a former term, to impose sentence and order commitment of petitioner to the penitentiary.

2. The Circuit Court of Appeals erred in affirming the order dismissing the writ of *habeas corpus*.

Summary of Argument.

The first order of the District Court, that of December 10, 1930, was clearly an indefinite or permanent suspension of the imposition of sentence. Petitioner was not placed on probation. This order, under the rule of the *Killits* case (*Ex parte United States*, 242 U. S. 27), was beyond the power of the court.

The law announced by this Court in that case is that while Federal courts have power to suspend the imposition or the execution of sentence temporarily for purposes consistent with the enforcement of the penal laws, they have no power by unconditional, permanent or indefinite suspensions, in effect, to refuse to impose the penalties for offenses provided by Congress.

With the passing of the trial term in which the invalid order of December 10, 1930, was entered, the trial court, according to the uniform holdings of the Federal and many State courts, lost jurisdiction thereafter to impose sentence. The Federal Probation Act of March 4, 1925, 43 Stat. 1259, c. 521, is inapplicable to the present case, because that act does not confer the power to suspend the imposition of sentence except as a necessary incident to subjecting a defendant to the discipline of probation. This was not done or attempted to be done in the present case. Consequently, when the trial court, on June 17, 1931, after the expiration of the trial term, entered its second order—that attempting to sentence and commit the petitioner—it was wholly without jurisdiction and the order was void.

ARGUMENT.

I.

The first order of the District Court was clearly an indefinite suspension of the imposition of sentence.

In the Memorandum filed by the Government on petition for certiorari herein, it is stated (p. 2) that "the order of the trial judge itself is not in the record". And similarly of the second order it is said (p. 3), "the order of the court itself is not in the record". We believe that the Government is here mistaken. What the Government's memorandum terms "brief extracts of the clerk's minutes" (p. 2, footnote) are, as we understand the practice in the Southern District of New York, the actual orders of

the Court. We do not understand that any other or further orders were, or are ordinarily in similar cases, made by the judge or entered by the clerk.

The first order is reproduced above. It is upon a printed discharge form, bears the signature of the Clerk and the seal of the Court, and constitutes the formal record of the order of the Court discharging the prisoner. Both this order and the docket entry contain the same words, "pleads guilty; sentence suspended". The Circuit Court of Appeals stated in its opinion (R. 7, 56 F. (2d) 152):

> "The district judge who received the plea suspended sentence *indefinitely.* * * *" (Italics ours.)

and again referred to the order as one "indefinitely and unconditionally suspending the imposition of sentence." We submit, therefore, that upon this matter of fact the record is complete, adequate, and leaves no doubt that, upon the plea of guilty being made, the court indefinitely suspended sentence and ordered the prisoner discharged.

The authorities are clear that such an order constitutes an indefinite or permanent suspension of sentence. In *Ex parte Singer,* 284 Fed. 60, the trial judge had said, at the time of imposing sentence on one count of an indictment, "I am not at this time going to sentence you on the other charges which are standing against you in this court." Judge Woolley, speaking for the Circuit Court of Appeals, held that this amounted to an indefinite postponement of sentence. He said (284 Fed. 62):

> "What the trial judge did at the trial term was to pass by the imposition of sentence upon the conviction on both counts of the information and on three counts of the indictment. This was in effect a suspension of the imposition of sentence; whether temporary or permanent the trial judge did not state. * * *
>
> "* * * But when a court declines to take action at the term of the conviction, it thereby inevitably postpones sentence, and when (in the absence of statute or accepted practice) a court postpones sentence silently, that is, without an indication of a lawful purpose, it in effect postpones sentence indefinitely. * * * That the inaction of the trial judge at the trial term on all counts of the information and on all counts of the indictment (save one) was, in effect, such a postponement of sentence, I cannot doubt. The judge said to the prisoner: 'I am not *at this time* going to sentence you on the other charges.' This left it uncertain whether he intended or did not intend to impose sentence on the other charges at some other time. That the postponement was therefore indefinite is clear. * * *"

In *United States* v. *Wilson*, 46 Fed. 748, the order of the trial court was that "sentence be suspended, and until further orders of this court, and that said defendant be released, and his bail exonerated." On appeal the Circuit Court said of this order (46 Fed. 749):

> "In this cause however, the record does not show that the suspension was for any such [temporary] reason, or for a certain or short time, but on the contrary, it appears that it was

> for such uncertain time as the defendant should continue to remain so favorably impressed with the laws of the land as to obey them. * * *"

The authorities are many that where the record shows a suspension of sentence and the release of the prisoner, the suspension is permanent and indefinite. *Mintie* v. *Biddle*, 15 F. (2d) 931; *People* v. *Barrett*, 202 Ill. 287; *Grundel* v. *People*, 33 Colo. 191; *Collins* v. *State*, (Okl. Cr. App.), 217 Pac. 896; *Smith* v. *State*, 188 Ind. 64; *In re Flint*, 25 Utah, 338; *Commonwealth* v. *Maloney*, 145 Mass. 205; *Weaver* v. *People*, 33 Mich. 296; *Warner* v. *State*, 194 Ind. 426.

The cases of *Miner* v. *United States*, 244 Fed. 422, and *Musick* v. *United States*, 2 F. (2d) 711, cited in the Memorandum of the Government (p. 5) are in no sense authorities to the contrary. The opinions in both of these cases were written by Judge Woolley, the author of the opinion in *Ex parte Singer, supra.* Indeed, *Ex parte Singer* cites the *Miner* case with approval, while the *Musick* case similarly cites *United States* v. *Wilson, supra.* The *Miner* and *Musick* cases hold only that when the suspension of imposition of sentence is by its own terms temporary and deferred to a definite future date, it will be presumed that the judge had a proper reason for such definite, temporary postponement even though the record does not disclose it.

This principle is, of course, wholly sound and is undisputed. If the record shows that the postponement was in terms to a definite time, it will clearly be presumed that the judge had proper reasons therefor. But it is equally true that when the record shows that the

suspension was by its terms indefinite, no presumption can change the record fact.

We submit, then, that upon the record in this case and upon the authorities, the order of the trial court on December 10, 1930, was an indefinite suspension of sentence. The order further in specific terms directed the discharge of the prisoner from custody. There was no order placing him upon probation.

II.

The order indefinitely suspending the imposition of sentence was invalid. With the expiration of the trial term, the Court, according to the uniform holding of Federal and many State courts, lost jurisdiction thereafter to sentence petitioner.

Ex parte United States, 242 U. S. 27 (commonly referred to as the *Killits* case) established that judges of United States courts did not have authority to suspend indefinitely the imposition or execution of sentence.[1] This doctrine had previously been announced by at least one Federal court (*United States* v. *Wilson*, *supra*) and by many State courts (see footnote, 242 U. S. 47). Thus many courts had already been or were soon called upon to consider the jurisdiction of a trial court to impose sentence after the expiration of the term of court at which an invalid order, indefinitely

---

[1] The Court below held that "The order indefinitely and unconditionally suspending the imposition of sentence was void. *Ex parte United States*, 242 U. S. 27" (R. 7, 56 F. (2d) 152).

suspending the imposition of sentence and discharging the prisoner, had been made. Compare *United States* v. *Mayer,* 235 U. S. 55.

The law announced by the Federal courts, and by those State courts which concurred in the doctrine of the *Killits* case, was uniform that with the expiration of the trial term the trial court lost jurisdiction and that any attempted imposition of sentence thereafter was void.

United States v. *Wilson,* 46 Fed. 748, cited with approval by this Court in *Ex parte United States, supra,* at page 50, appears to have been the first case in the Federal courts. In June, 1888, imposition of sentence in that case was suspended upon defendant's promise to obey the law. In June, 1890, the trial judge's successor revoked the order and imposed sentence. The Circuit Court held that the trial judge transcended his authority by the order of suspension, and continued (p. 749):

> "The court having erred in its order of suspension of sentence, can it subsequently, at another term of court, and especially by a judge, who did not try the case, revoke such order, and proceed to a rendition of judgment? To hold that a court may from time to time, and term to term, revoke its orders, and by new orders attempt the correction of former errors, to say the least, would lead to a most uncertain practice. * * *"

Judgment was reversed and the defendant discharged.

In *Ex parte Singer,* 284 Fed. 60 (C. C. A. 3rd) defendant was sentenced on the third of several counts,

sentences on other counts being indefinitely deferred. An appeal was taken from the sentence imposed on the ground that it was excessive, and it was so held to be. Three terms after the trial term the trial court resentenced the defendant and at that time also imposed consecutive sentences upon certain of the remaining counts. After serving the period of the sentence imposed on the third count, the petitioner brought *habeas corpus* and was discharged. Judge Woolley said (pp. 63-4):

> "The weight of authority is that when a court has, without a valid reason and quite indefinitely, postponed the pronouncement of sentence, it cannot at a subsequent term proceed to judgment by imposing sentence. *United States* v. *Wilson* (C. C.), 46 Fed. 748; *Ex parte United States*, 242 U. S. 27, 50. * * * If after taking no action on the conviction under the first and second counts of the information and under the first, second and fourth counts of the indictment for more than three terms, the trial judge retained jurisdiction to enter judgment by imposing sentence under the second count of the information and under the first count of the indictment (sale counts), he has like jurisdiction, now or any time in the future, to impose sentence on the conviction under the first count of the information and second and fourth counts of the indictment (transportation counts), with reference to which the imposition of sentence is still pending. Clearly such a proposition cannot be sustained by any principle of law found in the authorities."

In *Mintie* v. *Biddle*, 15 F. (2d) 931 (C. C. A. 8th), the defendant pleaded guilty and was released. This

case was continued to the next term, without any sentence being then imposed or any order entered. Thereafter no further order was made in the case for some thirty-four months and in the meantime five terms of court came and went. Thereupon petitioner was ordered to appear as a witness and upon doing so was put in jail and sentenced. He was discharged on *habeas corpus*. The court said (p. 933):

> "So the question presented by the case is whether the trial court, by postponing the sentence of petitioner indefinitely, lost jurisdiction to lawfully impose a sentence on him at all.
>
> "We think it did, and we think the great weight of the ruled cases, as well as of the analogous authorities and the reason of the thing, lead to the same conclusion. Some latitude of action of the court, referable to the furtherance of the administration of justice, of course exists. * * * Here, however, the government, for its own ends and convenience deferred sentence till such time as the district attorney might see fit to notify defendant to appear. Thirty-four months passed, and then defendant was notified to appear as a witness, and not as a defendant. Obviously, the matter of the furtherance of the administration of justice is not a unilateral one. The accused is due some modicum of consideration. It is not alone the ends and accommodation of the government which are to be considered and subserved; but those of the defendant as well. Held thus in suspension indefinitely and for a period which turned out to be thirty-four months, defendant could, in the interim, make no plans, enter into no contracts, engage in no permanent occupa-

> tion, and bind himself to no obligations, or create any permanent ties, business or domestic. But so much for the reasons for the view that an indefinite deferment of sentence is not warranted by matters which merely rest *in pais*. Let some reference be made to the cases."

The court distinguished its own prior decision in *Morgan* v. *Adams*, 226 Fed. 719 (C. C. A. 8th) which did not involve the suspension of *imposition* but the suspension of *execution* of a sentence properly imposed. It pointed out, as it had done in the earlier case, that the two parts of the trial court's order therein were separate and distinct; one part was valid and imposed sentence, the other was invalid and attempted to suspend the execution of the sentence. The net result was a valid sentence of which a prisoner seeking to be discharged on *habeas corpus* could not complain.

The court then reviewed the cases already cited here and a number of State cases. Those State courts, which hold that judges do not have the power to suspend indefinitely the imposition of sentence, also hold that where such action is attempted and thereafter the trial term expires, the trial court is without jurisdiction to impose sentence.[2]

---

[2]In the citation of State cases there have often been confused cases relating to suspension of the *imposition* of sentence and cases relating to suspension of *execution* of sentence. The following cases hold that, when the imposition of sentence has been indefinitely suspended or postponed and the trial term has expired, the trial court has no jurisdiction thereafter to

We have found no decision to the contrary by any Federal court with the exception of the *De Angelo* case, *infra,* decided on the assumed authority of the Federal Probation Act and discussed below. The doctrine of the *Wilson* case is tentatively accepted by the Circuit Court of Appeals for the Sixth Circuit, in *Ormsby* v. *United States,* 273 Fed. 977, though not involved in that case. And we have already pointed out that *Miner* v. *United States, supra,* and *Musick* v. *United States, supra,* involved only suspensions specifically made temporary and which are admittedly valid and proper. Furthermore, the opinions in the *Miner* and *Musick* cases were written by Judge Woolley. In both opinions he cited *Ex parte Wilson* with approval, and after the *Miner* case but before the *Musick* case he wrote the opinion in *Ex parte Singer.* It is clear, therefore, that Judge Woolley did not re-

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impose sentence: *Grundel* v. *People,* 33 Colo. 191 (1905); *Republic of Hawaii* v. *Pedro,* 11 Hawaii 287 (1898); *People* v. *Allen,* 155 Ill. 61 (1895); *People* v. *Barrett,* 202 Ill. 287 (1903); *Smith* v. *State,* 188 Ind. 64 (1919); *Warner* v. *State,* 194 Ind. 426 (1924); *In re Beck,* 63 Kan. 57 (1901); *State* v. *Sapp,* 87 Kan. 740 (1912); *Weaver* v. *People,* 33 Mich. 296 (1876); *State* v. *Hockett,* 129 Mo. App. 639 (1908); *Collins* v. *State,* 217 Pac. 896 (Okla. Cr. App. 1923); *In re Flint,* 25 Utah 338 (1903). See *People* v. *Kennedy,* 58 Mich. 372 (1885); *Hitchcock* v. *State,* 145 Tenn. 626 (1921).

Among States, in which the rule of the *Killits* case is in force, there is a division of authority upon whether, after *execution* of sentence has been suspended and the term of court has expired, the defendant may be lawfully imprisoned. The following cases

gard his utterance in either the *Miner* or the *Musick* case as containing any disapproval or limitation of the rule laid down in *Ex parte Wilson* and followed by him in *Ex parte Singer*. In fact he himself made this clear by saying, in the *Miner* case (244 Fed. 424):

> "This being true [*i. e.*, that the suspensions were temporary and definite], the validity of the orders postponing sentence is established, leaving for decision no question of the court's jurisdiction to impose sentence at a later term."

The *Musick* case was decided upon the same ground, as was also *Gillespie* v. *Walker*, 296 Fed. 330 (C. C. A. 4th).

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hold that the suspension being invalid and the sentence valid, the prisoner may be lawfully held: *Tanner* v. *Wiggins*, 54 Fla. 203 (1907); *Neal* v. *State*, 104 Ga. 509 (1898); *Miller* v. *Evans*, 115 Ia. 101 (1901); *Brabandt* v. *Commonwealth*, 157 Ky. 130 (1914); *Fuller* v. *State*, 57 So. 6, 100 Miss. 811, 57 So. 806 (1912); *State* v. *Abbott*, 87 S. C. 466 (1910); *Spencer* v. *State*, 125 Tenn. 64 (1911); *Reese* v. *Olsen*, 44 Utah 318 (1914). The following cases hold that subsequent imprisonment is unlawful: *State* v. *Voss*, 80 Ia. 467 (1890); *In re Peterson*, 19 Id. 433 (1911); *In re Strickler*, 51 Kan. 700 (1893); *Ex parte Cornwall*, 223 Mo. 259 (1909); *State* v. *Murphy*, 23 Nev. 390 (1897); *In re Markuson*, 5 N. Dak. 180 (1895); *Ex parte Clendenning*, 22 Okla. 108 (1908); *In re Webb*, 89 Wis. 354 (1895). Compare *Ex parte Bugg*, 163 Mo. App. 44 (1912).

In those jurisdictions in which the rule of the *Killits* case is not law, and a court may lawfully suspend indefinitely the imposition or execution of sentence, it is usually held that such proper suspension may later

The case of *United States ex rel. Campbell* v. *Bishop*, 47 F. (2d) 95 (C. C. A. 5th), though cited by the Circuit Court of Appeals in this case (R. 7) and by the Government's Memorandum (p. 7) was, in reality, not a ruling upon the question here involved. *In that case everything occurred within the same term of court.* Moreover, there was no suspension *of the imposition of sentence.* The defendant pleaded guilty. The sentence as recorded by the Clerk was a fine and imprisonment, the prison sentence to be suspended upon the payment of the fine. Soon thereafter defendant was arrested for violating probation and after a hearing was delivered to the penitentiary to serve his sentence. The trial judge thereafter ordered, within the term, that the minute recording the sentence

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be revoked and commitment ordered. Compare, as to indefinite suspension of imposition, *Ex parte Williams*, 26 Fla. 310 (1890); *Ex parte St. Hilaire*, 101 Me. 522 (1906); *Commonwealth* v. *Dowdican's Bail*, 115 Mass. 133 (1874); *Philpot* v. *State*, 65 N. H. 250 (1889); *People* v. *Court of Sessions*, 141 N. Y. 288 (1894); *Commonwealth* v. *Dunleavy*, 16 Pa. Sup. Ct. 380 (1901). Compare, as to indefinite suspension of execution, *Sylvester* v. *State*, 65 N. H. 193 (1889); *State* v. *Drew*, 75 N. H. 402 (1909). Even in these jurisdictions, if the conditions of suspension are complied with, the court may lose its power to revoke the suspension. See *State* v. *Hilton*, 151 N. C. 687 (1909). Cases often cited as contrary to the prevailing rule discussed in the text are usually found to have arisen in these jurisdictions in which the rule of the *Killits* case is not law.

be corrected to conform to the bench docket and the following was thereupon added to it (47 F. (2d) 96):

> "and that you be paroled to W. F. Fox, Deputy Marshal, and shall report to him every 30 days. Upon violation of any law parole to be cancelled and remission to serve term."

The Court said (as Judge Sanborn had in *Morgan* v. *Adams, supra*) that, if the sentence as originally recorded had been the one pronounced, it would have been valid in so far as it imposed a fine and imprisonment and invalid in so far as it attempted indefinitely to suspend the execution of the prison term. The invalid portion could have been eliminated leaving the valid portion. It also held that a court has complete power within the term to correct an error in the recording of its judgments. The case, therefore, is in no sense a decision upon the point here under consideration.

The foregoing cases set forth the state of the law upon the point here in question unless it has been altered by the Federal Probation Act. They hold that if a court indefinitely suspends the imposition of sentence and discharges the defendant, it loses jurisdiction with the passing of the trial term, and any order entered thereafter sentencing the defendant is void. The Circuit Court of Appeals for the Sixth Circuit, in deciding *Ex parte De Angelo,* 50 F. (2d) 847, the case chiefly relied upon by the Government, concedes that prior to the Probation Act the law was as here stated. We shall consider that case with the statute upon which it is based.

III.

The Federal Probation Act does not confer the power to suspend sentence except as a necessary incident to subjecting a defendant to the discipline of probation.

The *Killits* case was decided in December, 1916. Chief Justice White there pointed out the power of Congress to enact probation legislation, 242 U. S. 27, 52; see *United States* v. *Murray,* 275 U. S. 347, 357. On February 28, 1917, a probation act passed the Congress and was sent to President Wilson. Congressional Record, Vol. 54, pp. 3637, 4373, 4527. He retained it unsigned and upon the expiration of the 64th Congress it failed to become law.[3] Such an act was finally approved March 4, 1925, 43 Stat. 1259, c. 521, and amended by the Act of June 6, 1930, c. 406, 46 Stat. 503; U. S. C. Tit. 18, Sec. 724-728. The Act, as amended, is printed in full as an appendix to this brief, page 33, *infra.*

The Act provides that courts of the United States having original jurisdiction over criminal actions,

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[3]It has been said that this action was taken on the advice of Attorney General Gregory. House Report No. 1377, 68th Cong., 2d Sess., p. 3; "Probation System in United States Courts", Hearings Before Senate Committee on Judiciary Feb. 21, 1924, p. 4. A note attached to the engrossed bill, which had been sent to the President, is as follows: "Dear Forster. I let this bill die. Please do what is usual with it. W. W." "Report on Pocket Veto", House Document No. 493, 70th Cong., 2d Sess., p. 41.

when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be served thereby, shall have power, after conviction or after a plea of guilty or *nolo contendere* for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best, or the court may impose a fine and may also place the defendant upon probation. The act confers upon the courts broad powers to revoke or modify any condition of probation or to change the period, except that such period together with any extensions may not exceed five years. It provides that judges of the district courts may appoint suitable persons to serve as probation officers without salary unless the needs of the public service require salaried officers, in which case they may be appointed. The duties of the probation officers are to furnish each person released on probation with a written statement of the conditions of probation, to keep informed concerning the probationer's conduct and condition and to report thereon to the court, to use all suitable means to improve the conduct and condition of probationers and to keep records of their work. The Attorney General is given supervisory powers over probation officers. If the conduct of the probationer is unsatisfactory, the officer may bring him before the court at any time within the maximum period for which he might have been sentenced and the court, if it deems best, may sentence the probationer or cause him to serve

the sentence previously imposed. If a probationer's conduct is satisfactory, the judge may discharge him and terminate the proceedings against him.

The report of the House Committee and the hearings held before the Senate Committee upon this bill, as well as the language of the act itself, leave no doubt that the purpose sought to be achieved was the creation of an elastic and salutary system of discipline to which might be subjected those who had been convicted of crime, but who might, in the opinion of the court, be restored to a useful position in society.[4]

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[4]House Report No. 1377, 68th Congress, 2d Session, and Hearings Before Subcommittee of Senate Committee on the Judiciary, February 21, 1924, "Probation System in United States Courts". For legislative hearings and Committee reports upon similar bills see "Probation System for Federal Prisoners", Hearings Before the House Committee on the Judiciary, on H. R. 42, 64th Congress, 1st Session, May 13, 1916; Hearings Before the Subcommittee of the Senate Committee on the Judiciary, *id.*, March 25, 1916; "Probation System in United States Courts", H. R. Rep. No. 1353, 64th Congress, 2d Session, to accompany H. R. 20414, January 25, 1917; Hearings Before the House Committee on the Judiciary, on H. R. 340, H. R. 1111, and H. R. 12036, 66th Congress, 2d Session, March 9, 1920; "Parole and Probation System for United States Courts", H. R. Rep. No. 1054, 66th Congress, 2d Session, to accompany H. R. 14136, May 28, 1920; Hearings Before the House Committee on the Judiciary, on H. R. 4126, 67th Congress, 1st Session, May 31, 1921; "Probation System in United States Courts", House Report No. 423, 68th Congress, 1st Session, to accompany H. R. 5195, April 1, 1924.

This purpose is commented upon by this court in *United States* v. *Murray, supra,* at page 357. It is also expounded by Judge Hutcheson in *United States* v. *Maisel,* 26 F. (2d) 275, in the course of which he said:

> "The statute in effect has accomplished at one stroke for the Federal courts the redramatization of the criminal law, which modern theories of criminal administration, with their tremendous emphasis upon individualization, have been slowly effecting, in the states of the United States and in foreign countries, a redramatization in which the controlling motif in the drama is the discovery of the true character of the individual before the bar, and the possibility of his readjustment without confinement, into the social scheme, * * *."

The fundamental element in this legislation—what Judge Hutcheson called the controlling motif of this redramatization—was the system of probation.[5] The

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[5] "Probation is also similar in some respects to suspension of sentence (and is sometimes unfortunately regarded as practically its equivalent). It implies, however, much more; and is in fact something quite distinct. It is a relatively full and formal procedure, and one demanding a certain definite organization. It does not stop with the mere respite of a sentence and the holding of it in abeyance. It goes to the extent of providing official surveillance and control for a given period, together with a preliminary study of the offender, the imposing upon him of definite conditions, and the committing of him to helpful influences—all integral parts of the system. * * * Probation con-

discipline of probation was to be substituted, in appropriate cases, for punishment which had been the only resource of the earlier theories of penology. This system of discipline was elaborately provided for. The judge might appoint suitable persons as probation officers with or without salary as need dictated. These officers were to supervise, counsel and befriend the probationer. He was to report to them regularly and they to the court. If the prisoner did not respond to this regimen, the law gave the court ample power to resort to sterner measures. If he did respond, the court, as Judge Hutcheson pointed out, might terminate all proceedings against him and restore him to society without the brand of criminality upon him.

It was for the purpose of making this system of discipline possible—and for this purpose only—that the district courts were given power to suspend the im-

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stitutes a disciplinary process which seeks to improve the behavior and the character of the offender." Best, *"Crime and the Criminal Law in the United States"* (New York, 1930) c. LIV, pp. 506-507. See also Cantor, *"Crime—Criminals and Criminal Justice"* (New York, 1932) c. XX, p. 335; *"The United States Probation System"*, Joel R. Moore, Supervisor, U. S. Probation System, Journal of Criminal Law and Criminology, Vol. XXIII, p. 638 (Dec. 1932). See generally, Chute, *"The Development of Probation in Federal Courts,"* Year Book National Probation Association, 1929, pp. 217-224; Bates, *"Probation in the United States Courts"*, *id.*, 1931, p. 69; McSweeney, *"Federal Probation"*, *id.*, 1930, pp. 140-146; McClintic, *"Probation"*, Address Before the Federal Judicial Conference, 1931.

position or the execution of sentence. There is not the slightest indication, either in the language of the statute, the report of the committee, or in the testimony of those persons who appeared at the hearings, that Congress had intended to confer on the district courts the arbitrary and uncontrolled power to suspend either the imposition or the execution of sentence without more. Such a power had been condemned by the Chief Justice in the *Killits* case as containing within it the power to refuse to enforce the criminal law. 242 U. S. 27, 42. The unaltered opposition of this court to any such power has recently been reaffirmed. In *Ex parte United States,* October Term, 1932, No. 19, Original, decided December 5, 1932, Mr. Justice Sutherland, speaking for the Court, said:

> "The authority conferred upon the trial judge to issue a warrant of arrest upon an indictment does not, under the circumstances here disclosed, carry with it power to decline to do so under the guise of judicial discretion; or, as this court suggested in *Ex parte United States,* 242 U. S. 27, 42, the power to enforce does not inherently beget a discretion permanently to refuse to enforce."

And again in *Sorrells* v. *United States,* October Term, 1932, No. 177, decided December 19, 1932, the Chief Justice, after citing the *Killits* case, said:

> "* * * In that case this Court decisively denied such authority to free guilty defendants, in holding that the court had no power to suspend sentences indefinitely. * * * And while recognizing the humane considerations which

> had led judges to adopt the practice of suspending sentences indefinitely in certain cases, the court found no ground for approving the practice 'since its exercise in the very nature of things amounts to a refusal by the judicial power to perform a duty resting upon it and, as a consequence thereof, to an interference with both the legislative and executive authority as fixed by the Constitution.' "

This principle is as essential to the administration of justice under the Constitution after the Probation Act as before. A district court can have no more power now than it had before to refuse to enforce the law, and Congress has not attempted to confer any such improper power. Congress has merely provided an alternative method of correction which the court may, in its discretion, employ.[6] To argue that by pro-

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[6] In "The United States Probation System," Journal of Criminal Law and Criminology, Vol. XXIII, p. 638, at p. 640, Mr. Moore, Supervisor U. S. Probation System, says:

> "At this point let me quote my chief, Sanford Bates, Director of the Bureau of Prisons, to whose vision and expert advice this U. S. Probation System is due:
>
> "'* * * It would be unthinkable today if there were not some alternative to imprisonment, an alternative which would not turn the culprit free but would retain a measure of control and guidance for his benefit and the protection of society.'
>
> "The probation alternative was made possible by the Act of Congress signed by President Coolidge March 4, 1925."

viding such an alternative method Congress has enabled courts to refuse to enforce either method—probation or imprisonment or fine—is to deny the fundamental principles upon which the *Killits* case and *Ex parte United States, supra,* were decided.

In so far as this Court has considered the Probation Act, its construction of it has been entirely in accord with the principles set forth above. In *United States* v. *Murray,* 275 U. S. 347, 357, Chief Justice Taft said:

> "The great desideratum was the giving to young and new violators of law a chance to reform and to escape the contaminating influence of association with hardened or veteran criminals in the beginning of the imprisonment. Experience had shown that there was a real *locus pœnitentiæ* between the conviction and certainty of punishment, on the one hand, and the actual imprisonment and public disgrace of incarceration and evil association, on the other. If the case was a proper one, great good could be done *in stopping punishment by putting the new criminal on probation.* The avoidance of imprisonment at time of sentence was therefore the period to which the advocates of a Probation Act always directed their urgency. * * *" (Italics ours)

And in *Burns* v. *United States,* October Term 1932, No. 378, decided December 5, 1932, Chief Justice Hughes said:

> "The Federal Probation Act (March 4, 1925, c. 521, 43 Stat. 1259; U. S. C., Tit. 18, secs. 724-727), confers an authority commensurate with its object. It was designed to provide a period

of grace in order to aid the rehabilitation of a penitent offender; to take advantage of an opportunity for reformation which actual service of the suspended sentence might make less probable. *United States* v. *Murray*, 275 U. S. 347, 357, 358; H. R. Rep. No. 423, 68th Cong., 1st Sess. Probation is thus conferred as a privilege and cannot be demanded as a right. It is a matter of favor, not of contract. There is no requirement that it must be granted on a specified showing. The defendant stands convicted; he faces punishment and cannot insist on terms or strike a bargain. To accomplish the purpose of the statute, an exceptional degree of flexibility in administration is essential. It is necessary to individualize each case, to give that careful, humane and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion. The provisions of the Act are adapted to this end. It authorizes courts of original jurisdiction, when satisfied 'that the ends of justice and the best interests of the public, as well as the defendant, will be subserved', to suspend the imposition or execution of sentence and 'to place the defendant upon probation for such period and upon such terms and conditions as they may deem best'.

* * * * * * * *

"Such procedural provisions as the Act contains harmonize with the view that the continuance of the probation, as well as the grant of it, rests in the court's discretion. * * *

"* * * He is still a person convicted of an offense, and the suspension of his sentence remains within the control of the court. The con-

> tinuance of that control, apparent from the terms of the statute, *is essential to the accomplishment of its beneficent purpose, as otherwise probation might be more reluctantly granted or, when granted, might be made the occasion of delays and obstruction which would bring reproach upon the administration of justice.*" (Citing cases.) (Italics ours.)

In these two opinions the Court makes it clear that the power given to the district courts is to suspend sentence *and* place upon probation, or as Chief Justice Taft expressed it, to stop punishment "by putting the new criminal on probation". The power to suspend the imposition of sentence is regarded as merely incidental and "essential to the accomplishment of its beneficent purpose"—probation. The Court appeared to have no doubt that the prisoner was facing either punishment or probation. There was no third alternative by which the judge could refuse to follow the dictate of Congress, and either discharge or retain control over the prisoner to carry out some plan of his own. On the contrary, on the same day on which the *Burns* case was decided the Court reaffirmed its adherence to the principle that judges cannot, through any exercise of discretionary power, refuse to enforce the law.

The Probation Act, therefore, conferred no authority upon Judge Coleman to enter the order of December 10, 1930. Furthermore, since the trial judge did not even purport to place the petitioner upon probation under that Act, its various provisions dealing with the control which may be exercised over prisoners

on probation have no application to this case. Compare *Smith* v. *State,* 188 Ind. 64, 66; *Ex parte Cornwall,* 223 Mo. 259, 270.

The only case in the Federal courts which holds the contrary of the principles of law stated above, is *Ex parte De Angelo,* 50 F. (2d) 847 (C. C. A., 6th). In that case the defendant on June 22, 1928, pleaded guilty to a conspiracy charge. On June 27th his co-defendants were tried, found guilty and sentenced. Sentence upon defendant was deferred without designation of any specific date in the term or any succeeding term upon which sentence would be imposed. On July 15, 1930, in the fourth term after the trial term, he was sentenced. He brought *habeas corpus.* At that proceeding it appeared from oral testimony that after pleading guilty he asked to be given a chance. He was told by the United States Attorney that he would be called when wanted. He was later indicted on a narcotic charge and acquitted. He was then sentenced on his prior plea of guilty. The court accepts the *Wilson, Singer* and *Mintie* cases, *supra* (see *Ormsby* v. *United States, supra,* page 15), as stating the law prior to the Probation Act. It then declares, without analysis of the statute, that the Probation Act authorizes the suspension of sentence and the subsequent revocation of such suspension. The court further asserts that even if under the Act an indefinite suspension is void, then the *Killits* case and *United States* v. *Bishop, supra,* are authorities for the proposition that the judge may eliminate the suspension and order commitment to the penitentiary.

What has been said above demonstrates, we submit, that the court was in error regarding the construction of the Federal Probation Act. We submit, further, that it was again in error in relying upon the two cases cited for the proposition sought to be derived from them. Both of these cases related not to suspension of the imposition of sentence but to suspension of the execution of sentence. In both cases the action taken was within the same term of court. They hold only, therefore, as we have pointed out above, that if a judge imposes a valid sentence and at the same time attempts invalidly to suspend the execution thereof, the valid sentence remains and may be enforced. They are no authority whatever for, and do not even bear upon, the proposition that if a court has improperly suspended the imposition of sentence and the term of court has thereafter expired, the court retains jurisdiction to impose sentence. This case is, therefore, entirely unsupported either by the statute or by the authorities upon which it relies. It is opposed by a long line of well considered cases in the Federal courts and by a great weight of authority in the State courts.

We submit, therefore, that the law today is just as it was uniformly held to be before the Probation Act,[7] with the single exception that suspension of the im-

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[7]It should be pointed out that the court below did not rest its decision upon the Probation Act or upon the *De Angelo* case. It cited merely the *Bishop* case, which we have shown, *supra*, p. 17, did not involve any of the questions here under consideration.

position or execution of sentence, incidental to and necessary for an order of court placing a prisoner upon probation, is proper and valid. If the prisoner is not placed upon probation, the suspension of the imposition of sentence is void and upon the expiration of the trial term the trial court loses jurisdiction to impose sentence.

The maintenance of these principles is, we submit, essential not only to the orderly administration of the Probation Act but also to the orderly administration of the criminal law—objects far transcending in importance the fate of this petitioner or all persons who may be placed in the same position. But this is not to say that the interest of such persons is not a matter of grave public concern. Enlightened social policy demands that in appropriate cases punishment be held in abeyance while the individual is undergoing a course of discipline directed to his ultimate recovery and restoration to society. It quite as strongly demands that no person—even a convicted offender—be kept hanging between incarceration and freedom, subject to no restorative process, but merely to the uncontrolled disposition of prosecuting officers or judges. As the Circuit Court of Appeals for the Eighth Circuit pointed out in *Mintie* v. *Biddle, supra,* the accused is due some modicum of consideration. No policy of justice requires that he be held indefinitely in suspense, not knowing what disposition is to be made of him and unable in the meantime to make constructive plans, to enter into contracts, engage in a permanent occupation, or to create any permanent ties, business or domestic.

Conclusion.

We, therefore, respectfully submit that the trial court was without jurisdiction to enter the order of June 17, 1931, sentencing this petitioner to imprisonment; that his imprisonment pursuant to that sentence is unlawful; and that the order of the Circuit Court of Appeals herein should be reversed and the cause remanded with instructions to discharge the petitioner from the custody of the respondent.

Respectfully submitted,

DEAN G. ACHESON,
Counsel for Petitioner.

APPENDIX.

The Act of March 4, 1925, Chap. 521, 43 Stat. 1259, as amended by the Act of June 6, 1930, Chap. 406, 46 Stat. 503. United States Code, Title 18, Sec. 724-728.

SEC. 1. The courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, shall have power, after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or modify any condition of probation, or may change the period of probation: *Provided,* That the period of probation, together with any extension thereof, shall not exceed five years.

While on probation the defendant may be required to pay in one or several sums a fine imposed at the time of being placed on probation and may also be required to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offense for which conviction was had, and may also be required to provide for the support of any person or persons for whose support he is legally responsible.

SEC. 2. When directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable.

At any time within the probation period the probation officer may arrest the probationer without a warrant, or the court may issue a warrant for his arrest. Thereupon such probationer shall forthwith be taken before the court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed.

SEC. 3. The judge or judges of any United States court or courts having original jurisdiction of criminal actions, except in the District of Columbia, may appoint one or more suitable persons to serve as probation officers within the jurisdiction and under the direction of the judge or judges making such appointments or of their successors. All such probation officers shall serve without compensation except that in case it shall appear to any such judge or judges that the needs of the service require that there should be salaried probation officers, such judge or judges may appoint such officers. The Attorney General shall fix the salaries to be paid probation officers and shall provide for

the necessary expenses of probation officers, including clerical service, and expenses for traveling when approved by the court. Such judge or judges may in their discretion remove any probation officer serving in their respective courts. The appointment of a probation officer shall be in writing and shall be entered on the records of the court or courts of the judge or judges making such appointment, and a copy of the order of appointment shall be delivered to the officer so appointed and a copy sent to the Attorney General. Whenever such judge or judges shall have appointed more than one probation officer he or they may designate one of such officers chief probation officer. Such chief probation officer shall direct the work of all probation officers serving in the court or courts of such judge or judges.

SEC. 4. It shall be the duty of a probation officer to investigate any case referred to him for investigation by the court in which he is serving and to report thereon to the court. The probation officer shall furnish to each person released on probation under his supervision a written statement of the conditions of probation and shall instruct him regarding the same. Such officer shall keep informed concerning the conduct and condition of each person on probation under his supervision and shall report thereon to the court placing such person on probation. Such officer shall use all suitable methods, not inconsistent with the conditions imposed by the court, to aid persons on probation and to bring about improvements in their conduct and condition. Each officer shall keep records of his work; shall keep accurate and complete accounts of all moneys collected from

persons under his supervision; shall give receipts therefor, and shall make at least monthly returns thereof; shall make such reports to the Attorney General as he may at any time require; and shall perform such other duties as the court may direct. Such officer shall perform such duties with respect to persons on parole as the Attorney General shall request. A probation officer shall have the power of arrest that is now exercised by a deputy marshal.

SEC. 4 (a). The Attorney General, or his authorized agent, shall investigate the work of the probation officers and make recommendations concerning the same to the respective judges and shall have access to the records of all probation officers. He shall collect for publication statistical and other information concerning the work of the probation officers. He shall prescribe record forms and statistics to be kept by the probation officers and shall formulate general rules for the proper conduct of the probation work. He shall endeavor by all suitable means to promote the efficient administration of the probation system and the enforcement of the probation laws in all United States courts. He shall incorporate in his annual report a statement concerning the operation of the probation system in such courts.

SEC. 5. This Act shall take effect immediately.

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No. 138

In the Supreme Court of the United States

OCTOBER TERM, 1932

JOSEPH F. MILLER, PETITIONER

v.

A. C. ADERHOLD, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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MEMORANDUM FOR THE RESPONDENT

The respondent does not oppose the petition.

OPINIONS BELOW

No opinion was rendered by the District Court. The *per curiam* opinion of the Circuit Court of Appeals (R. 7) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 20, 1932. (R. 8.) A petition for rehearing was denied March 11, 1932.

(R. 10.) The petition for certiorari was filed June 6, 1932. Petitioner invokes the jurisdiction of this Court under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the suspension of the imposition of sentence upon the petitioner was invalid.

2. If so, whether sentence was properly imposed at a later term.

STATEMENT

On December 10, 1930, petitioner pleaded guilty in the United States District Court for the Southern District of New York to a charge of stealing from the United States mails. On the same day the court suspended the imposition of sentence and ordered the defendant discharged from custody. The order of the trial judge itself is not in the record,[1] nor does it appear what, if anything, the judge said orally at the time. (R. 2.) On June 17, 1931, two months after the expiration of the term (Judicial Code, Sec. 97 (U. S. C., Title 28, Sec. 178); General Rule 6 of the United States District Court for the Southern District of New York), petitioner was sentenced by another judge of the same court

[1] The complete record in the District Court for the Southern District of New York does not appear in the record in the instant case. The facts above stated are taken from copies of the docket entries and two brief extracts of the clerk's minutes which were attached as exhibits to the petition for a writ of habeas corpus.

to serve four years' imprisonment in the United States Penitentiary at Atlanta, Georgia, the sentence to run from that date. (R. 3.) Whether the petitioner was present at this time, and what, if anything, was said by the judge does not appear. The order of the court itself is not in the record. On October 27, 1931, a motion to vacate the sentence was made and denied. No appeal from the order of denial was taken. (R. 2.)

Thereafter, on or about November 12, 1931, petitioner filed in the United States District Court for the Northern District of Georgia a petition for a writ of habeas corpus wherein he asserted that he was being unlawfully deprived of his liberty by respondent, as warden of the United States Penitentiary at Atlanta, Georgia, because the judgment upon which petitioner's commitment was based was rendered by a court which was without jurisdiction and was therefore void. (R. 1–2.) The writ issued, but following a hearing, the court ordered it dismissed and petitioner remanded to the custody of respondent. (R. 4.) Upon appeal, the order of the District Court was affirmed by the United States Circuit Court of Appeals for the Fifth Circuit. (R. 8.)

DISCUSSION

If the suspension of the imposition of sentence was valid, it is clear that the District Court possessed jurisdiction subsequently, within or after

the term, to impose sentence. *Miner* v. *United States,* 244 Fed. 422, 424 (C. C. A. 3d).

The petitioner contends that the suspension of sentence was void because, he asserts, it was indefinite and unconditional. He argues that prior to the enactment of the Federal Probation Act (U. S. C., Title 18, Secs. 724–727) the suspension of sentence would have been void under *Ex parte United States,* 242 U. S. 27, and that under the Federal Probation Act the suspension of sentence can not be sustained because the District Judge did not place the petitioner upon probation for a fixed period and upon specific conditions, as, he asserts, is contemplated by that statute. We believe that the suspension of sentence was valid either under or apart from the Probation Act, but there appears to be some conflict of decisions upon both phases of this question.

Ex parte United States, supra, does not establish that a United States District Judge is wholly without power to suspend the imposition of sentence, but that he has no power, apart from a statute, to suspend the imposition of sentence *permanently,* i. e., that he is without authority to exempt the convict permanently and absolutely from the punishment provided by the statute. The Court recognized the power of the trial court temporarily to suspend either the imposition or execution of sentence when done for a purpose incident to the imposition of the sentence, "such as to give opportunity for a motion for a new trial or in ar-

rest, or to enable the judge to better satisfy in his own mind what the punishment ought to be." (242 U. S. 27, 44, 46.)

In the case at bar it does not appear that the District Judge intended the suspension of sentence to be permanent or to operate in any way as a reprieve or pardon. So far as the record discloses he may have deferred the imposition of sentence only temporarily for the purpose of securing further data which he deemed requisite to the imposition of the sentence. If the suspension were for that or a similar purpose, it would clearly have been valid. In the absence of any facts explaining the suspension of sentence, we submit that this Court should presume the facts to be such as to make the suspension legal rather than illegal. *Miner* v. *United States,* 244 Fed. 422, 424 (C. C. A. 3d); *Musick* v. *United States,* 2 F. (2d) 711, 712 (C. C. A. 3d). In the *Miner case, supra,* the court said (p. 424):

> We should not assume that it [the suspension of sentence] was actuated by improper or unlawful considerations. Nor does the court's purpose appear. But every legal intendment favors the notion that it had a purpose and that the purpose was lawful. In fact, we must assume, in the absence of anything in the record to the contrary, that the postponements were made for a lawful purpose in the orderly progress of the case. This being true, the validity of the orders postponing sentence is established, leaving

for decision no question of the court's jurisdiction to impose sentence at a later term.

While the above views seem clearly to be correct, there are decisions which indicate that any *indefinite* suspension of sentence, where it extends beyond the term, is beyond the power of a United States District Judge. See *Mintie* v. *Biddle,* 15 F. (2d) 931, 932, 933 (C. C. A. 8th).

Even if the suspension of sentence was invalid under *Ex parte United States, supra,* we believe that it was valid under the subsequently enacted Federal Probation Act, and it has been, in effect, so held. *Ex parte De Angelo,* 50 F. (2d) 847 (C. C. A. 4th). See also *Finer* v. *Commonwealth,* 250 Mass. 493; *People* v. *Patton,* 221 N. Y. 409. But in *Hodges* v. *United States,* 35 F. (2d) 594, 595 (C. C. A. 10th), the court held to be void "an order, which was not an order of probation made pursuant to authority given by section 724, Tit. 18, U. S. C. (18 U. S. C. A. § 724), but an attempt to suspend the sentences * * *." In the case at bar the suspension of sentence did not purport to be an order of probation and the Circuit Court of Appeals did not rest its decision upon the Federal Probation Act.

Assuming the suspension of the imposition of sentence to have been invalid, a further question arises as to the legal effect of such an invalid order upon the jurisdiction of the trial court to impose sentence after the expiration of the term. In cases arising prior to the Federal Probation Act it has been held, erroneously we submit, that the effect

of an invalid, indefinite suspension of sentence is to deprive the trial court of jurisdiction to impose sentence at a later term. *United States* v. *Wilson,* 46 Fed. 748 (C. C., D. Idaho); *Ex parte Singer,* 284 Fed. 60 (C. C. A. 3d); *Mintie* v. *Biddle,* 15 F. (2d) 931 (C. C. A. 8th), *supra.* Other courts, reaching a conclusion which we believe clearly to be correct, have held that jurisdiction to impose sentence is not lost after the expiration of the term because of an invalid order suspending the imposition of sentence. *Hammers* v. *United States,* 279 Fed. 265 (C. C. A. 5th). See also *United States* v. *Bishop,* 47 F. (2d) 95 (C. C. A. 5th); *Bryant* v. *United States,* 214 Fed. 51 (C. C. A. 8th); *Ex parte Peeke,* 144 Fed. 1016, 1020 (N. J.), affirmed, 153 Fed. 166 (C. C. A. 3d).

CONCLUSION

While we believe the decision of the Circuit Court of Appeals to be correct we do not feel warranted in opposing the petition in view of the conflict of decisions upon various phases of the questions involved.

Respectfully submitted.

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No. 138

In the Supreme Court of the United States

OCTOBER TERM, 1932

JOSEPH F. MILLER, PETITIONER

v.

A. C. ADERHOLD, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 138

JOSEPH F. MILLER, PETITIONER

v.

A. C. ADERHOLD, WARDEN, UNITED STATES PENITENTIARY, Atlanta, Georgia

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINION BELOW

No opinion was rendered by the District Court. The *per curiam* opinion of the Circuit Court of Appeals (R. 7) is reported in 56 F. (2d) 152.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 20, 1932. (R. 8.) A petition for

rehearing was denied March 11, 1932. (R. 10.) The petition for certiorari was filed June 6, 1932, and was granted December 5, 1932. (R. 11.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the suspension of the imposition of sentence upon the petitioner was invalid.

2. If so, whether sentence was improperly imposed at a later term.

STATUTE INVOLVED

The Federal Probation Act of March 4, 1925, c. 521, 43 Stat. 1259, as amended by the Act of June 6, 1930, c. 406, 46 Stat. 503 (U. S. C., Title 18, Secs. 724–725; U. S. C. Sup. V, Title 18, Secs. 726–728), is printed in full in the appendix to petitioner's brief.

STATEMENT

On or about November 12, 1931, the petitioner herein filed in the United States District Court for the Northern District of Georgia a petition for a writ of *habeas corpus* which alleged that he was being unlawfully detained in the Atlanta Penitentiary under a commitment issued by the United States District Court for the Southern District of New York, for the reason that that court was without jurisdiction to impose the sentence upon which the commitment was based. He prayed a discharge from imprisonment if it should be found that his detention was illegal. (R. 1–2.) The writ issued (R. 4), and the warden of

the penitentiary responded by justifying petitioner's detention under the commitment aforesaid (R. 4). After a hearing the writ was dismissed and the petitioner remanded to the custody of the warden. (R. 4.) Upon an appeal to the Circuit Court of Appeals for the Fifth Circuit, which was prosecuted *in forma pauperis*, the judgment of the District Court was affirmed. (R. 7–8.)

The only facts recited in the petition for *habeas corpus* as the basis of petitioner's attack upon the commitment are the following:

On August 27, 1928, petitioner was indicted in the United States District Court for the Southern District of New York upon the charge of stealing from the United States mails.[1] On December 10, 1930,[2] the petitioner was arraigned and pleaded guilty, whereupon sentence was suspended and the petitioner ordered discharged from the custody of the marshal. On June 17, 1931, another judge sentenced petitioner to four years in the Atlanta Penitentiary. A motion to vacate this sentence, made on October 27, 1931, was denied. No appeal was taken from the denial of this motion. (R. 1–2.)

The allegations of the petition were not denied by the warden in his response.

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[1] This offense is made punishable by Section 194 of the Criminal Code, as amended (U. S. C., Title 18, Sec. 317), which prescribes as a penalty a fine of $2,000 or imprisonment for not more than five years, or both.

[2] Erroneously stated in the petition for *habeas corpus* as September 10, 1930. (See R. 2, 3.)

The order of December 10, 1930,[3] suspending the imposition of sentence, a copy of which was attached to the petition for *habeas corpus* as Exhibit A, reads as follows (R. 2):

> Deft. pleads guilty; sentence suspended.
> Ordered that the prisoner be discharged from the custody of the U. S. marshal.

This order was entered by the District Court at its December Term, 1930.[4] The docket entries made in connection with this order were as follows (R. 3):

> Dec. 10, 1930. Pleads guilty; sentence suspd. Coleman, J.
>
> * * * * *
>
> Dec. 15, 1930. Filed discharge from custody of U. S. Marshal.

The judgment and commitment of June 17, 1931,[5] a copy of which was attached to the petition for *habeas corpus* as Exhibit B, was entered during the June, 1931, Term of the District Court. It read (R. 3):

---

[3] While this document, like the judgment and commitment of June 17, 1931, is designated as an "extract from the minutes," we are advised that under the practice obtaining in the Southern District of New York such documents are considered as the orders of the court.

[4] Terms of the District Court for the Southern District of New York are held at New York City on the first Tuesday in each month and are extended for ninety days under standing rule. See Judicial Code, Sec. 97, as amended (U. S. C., Title 28, Sec. 178); General Rule 6 of the United States District Court for the Southern District of New York.

[5] See footnote 3, *supra*.

> On motion of the United States attorney, ordered sentenced.
>
> The court thereupon proceeded to pass judgment, and sentenced the prisoner to be imprisoned for a term of four (4) years. Sentence to be executed at the U. S. penitentiary, Atlanta, Ga. Sentenced to date from June 17, 1931.

The docket entries made in connection with this judgment are as follows (R. 3):

> June 17, 1931 P. G.[6]; sentenced to four years U. S. penitentiary, Atlanta, Ga., Goddard, J.

A certified copy of the entire transcript of record in the criminal proceeding has been obtained from the Clerk of the United States District Court for the Southern District of New York and has been lodged with the Clerk of this Court.

SUMMARY OF ARGUMENT

I

If the suspension of imposition of sentence was valid, the District Court concededly had jurisdiction to impose sentence after the expiration of the term.

Prior to the Federal Probation Act of March 4, 1925, Federal courts, while without power indefinitely and permanently to suspend the imposition of sentence (*Ex parte United States*, 242 U. S. 27), could

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[6] The purpose of this second reference to a plea of guilty was undoubtedly to identify the sentence with petitioner's plea of December 10, 1930.

lawfully defer imposing sentence temporarily for any purpose reasonably incident to the administration of justice and the imposition of the sentence, such as to afford opportunity for the consideration of motions for a new trial or in arrest of judgment, or to enable the judge to satisfy his own mind as to what the punishment should be. While the imposition of sentence in the case at bar was not postponed to a definite date in the future, it does not affirmatively appear that the District Judge intended the suspension to be permanent or to operate as a reprieve or pardon. Once the jurisdiction of a Federal court has attached, every presumption must be indulged in favor of the rightful exercise thereof until the contrary is affirmatively established. So far as disclosed by the record, the trial judge may have deferred sentence temporarily for the purpose of obtaining information which he deemed essential for the imposition of sentence. In the absence of facts explaining the character of the suspension and in the absence of an affirmative showing by petitioner that the suspension was intended to be indefinite and permanent, it will be presumed to have been for a lawful purpose, and therefore valid.

Even if invalid under the law as it stood prior to the Probation Act, the suspension was valid under that Act, which expressly gave the trial court power to suspend the imposition or execution of sentence and to place the defendant upon probation. Assuming that the Act does not authorize a suspension of sentence without a simultaneous grant of probation,

it does not affirmatively appear from the record that at the time of the suspension of sentence the petitioner was *not placed upon probation*. In the absence of an *affirmative* showing to the contrary, this Court should presume the facts to be such as would make the order of suspension valid rather than invalid.

Moreover, certain provisions in the Probation Act indicate that there may be a suspension of sentence under that Act which is not necessarily connected with a formal probation. It has been held that a general, indefinite suspension of sentence, without a grant of probation, is within the power of a District Judge under that statute. Even if an order suspending sentence under the Probation Act should properly contain a reference to a stated period and terms of probation, the authorities indicate that the effect of a suspension of sentence for an indefinite period, where nothing appears as to the purpose of the suppension, is automatically to place the defendent upon probation for such time, not exceeding the statutory limitation of five years, as the court shall remain satisfied that the ends of justice are being subserved thereby.

II

Assuming the suspension of sentence to have been void, the sentence could lawfully be imposed at a subsequent term. This Court has held that in the absence of a statute providing otherwise the Federal courts upon the conviction of a defendant have no discretion but to impose the penalty provided by

law. The judge may suspend imposition of sentence temporarily for a purpose incident to the imposition thereof, or he may suspend it for a definite period or indefinitely under the Probation Act, but if he does neither of these things the duty remains to enforce the penalty provided by law. Since, under *Ex parte United States, supra*, he can be compelled to do this, he may do it voluntarily.

No difficulty arises from the fact that the sentence in the case at bar was imposed at a term subsequent to the one in which it was, it is alleged, invalidly suspended. Until a final order or judgment has been entered the trial court retains jurisdiction over the case from term to term without a formal order of continuance. In a criminal case the final judgment is the sentence, and in such case the court does not lose jurisdiction until the entry of a valid sentence. An order suspending the imposition of sentence is not the sentence, nor is it a final, appealable order. If, as petitioner contends, the order suspending the imposition of sentence in the case at bar was void, no final order was entered in the petitioner's case until the entry of the sentence for which he stands committed. Accordingly, sentence was imposed at a time when the trial court had jurisdiction to impose it.

This conclusion is supported by many authorities. Those cases which hold to the contrary are indefensible and are opposed to principles frequently announced and applied by this Court.

ARGUMENT

I

THE ORDER SUSPENDING THE IMPOSITION OF SENTENCE WAS VALID

If the order of the trial court of December 10, 1930, suspending the imposition of sentence (R. 2), was valid, it is clear that the court retained jurisdiction to impose sentence, within any reasonable time, at a later term.[7] *Miner* v. *United States*, 244 Fed. 422, 424 (C. C. A. 3d). The petitioner does not contend otherwise.

But the petitioner asserts that the suspension of the imposition of sentence was invalid because it was "an indefinite or permanent suspension." He argues that prior to the Federal Probation Act of March 4, 1925, which appears in full in the appendix to the petitioner's brief, the suspension of sentence would have been void under the so-called *Killits case* (*Ex parte United States*, 242 U. S. 27), and that under the Federal Probation Act the order of suspension cannot be sustained because, so he says, the District Judge did not place the petitioner upon probation for a fixed period and upon specific conditions as, he asserts, is contemplated by that statute. The Government contends that the suspension of the imposition of sentence was valid either apart from or under the Probation Act.

[7] Those courts which uphold the validity of an indefinite, permanent suspension of sentence uniformly recognize the power of the trial court to impose sentence at a subsequent term. See footnote 18, p. 28, *infra*.

A. THE SUSPENSION OF SENTENCE APART FROM THE FEDERAL PROBATION ACT

Ex parte United States, supra, does not establish that a United States District Judge is without power to suspend the imposition of sentence. In that case, after sentence had been imposed, the trial judge had ordered

> that the execution of the sentence be * * * suspended during the good behavior of the [defendant].

Thereafter, by original petition in this Court, the Government sought a writ of mandamus to compel the trial judge to eliminate, as void, that part of the order by which the judge attempted to suspend the execution of the sentence. In stating the question before it for decision, this Court said (242 U. S. 27, 40):

> The argument on behalf of the respondent [the trial judge] concedes that the order of suspension was *permanent* and *absolutely removed* the accused from the operation of the punishment provided by the statute; and it is further conceded that a suspension of this character was the equivalent of an *absolute and permanent* refusal to impose under the statute any sentence whatever. (Italics ours.)

The Court held that the portion of the order attacked was void as beyond the power of the trial judge, and granted the writ. With reference to the contention "that the right to refuse to impose a sentence fixed by statute or to refuse to execute such a sentence when imposed, is a discretion inhering in the judicial

power," the Court said (p. 42) that such contention was unfounded "since it must rest upon the proposition that the power to enforce begets inherently a discretion to *permanently* refuse to do so." The Court further said that "the plain legislative command fixing a specific punishment for crime" was not "subject to be *permanently* set aside by an implied judicial power upon considerations extraneous to the legality of the conviction." (Italics ours.)

Clearly the holding of the Court in the *Killits case* was that a Federal judge has no power, apart from a statute, to suspend the enforcement of a criminal statute (which, we assume, applies to the *imposition* as well as to the *execution* of a sentence) *permanently*, i. e., that he is without authority to exempt the convict permanently from the punishment provided by the statute.[8] The Court expressly recognized the power of the trial court temporarily to suspend the imposition of sentence when done for a purpose necessary in the administration of justice or incident to the imposition of the sentence, such as "to give opportunity for a motion for a new trial or in arrest, or to enable the judge to better satisfy his own mind what the punishment ought to be" (242 U. S. 27, 44, 46). This power has since been frequently exercised and approved.

In numerous cases the Federal courts have sustained the validity of suspensions (sometimes re-

[8] See the comment of the Court on the *Killits case* in *Ex parte United States*, No. 19, Original, decided December 5, 1932.

peated suspensions) of the imposition of sentence, for varying purposes, to a fixed future date or term of court. *Miner* v. *United States*, 244 Fed. 422, 424 (C. C. A. 3d), *supra*; *Ormsby* v. *United States*, 273 Fed. 977, 984 (C. C. A. 6th); *Gillespie* v. *Walker*, 296 Fed. 330, 332 (C. C. A. 4th); *Musick* v. *United States*, 2 F. (2d) 711 (C. C. A. 3d); *King* v. *United States*, 25 F. (2d) 242, 244 (C. C. A. 6th); *Ex parte Dellan*, 26 F. (2d) 243, 244 (C. C. A. 9th); *Caldwell* v. *United States*, 36 F. (2d) 738, 740 (C. C. A. 10th), certiorari denied, 281 U. S. 725. In the *Miner*, *Musick*, and *Dellan cases* it did not appear from the record in the trial court for what reason or purpose the suspensions were granted. In at least one case, *Taylor* v. *Walker*, 6 F. (2d) 577 (C. C. A. 4th), the court sustained a sentence imposed, apparently, at a term subsequent to that in which the trial judge had merely suspended the sentence generally, without taking any action as to bail, confinement, or continuance of the case.[9]

Although in the case at bar the suspension was not to a stated term or date in the future, it does not affirmatively appear that the district judge intended the suspension of sentence to be permanent or to

[9] The defendant had pleaded guilty on April 17, 1924, at the April term of the United States District Court for the Southern District of West Virginia, at Charleston, whereupon, according to the clerk's minutes, the judge took time to consider his judgment. On December 3, 1924, at the November Term (U. S. C., Title 28, Sec. 194), the defendant was arrested on a capias and sentenced.

operate as a reprieve or pardon. The order of December 10, 1930, so far as the record discloses, merely shows (R. 2):

> Deft. pleads guilty; sentence suspended.
>
> Ordered that the prisoner be discharged from the custody of the U. S. marshal.[10]

No further facts with reference to the suspension of sentence, or the reasons therefor, appear either in the record in this case or in the certified transcript of the record in the District Court for the Southern District of New York. What was said orally by the trial judge at the time of the suspension does not appear. No allegations as to the purpose of the order of suspension may be found in the petition for a writ of *habeas corpus*. (R. 1–2.) Whatever was done was apparently with the full consent of petitioner. So far as the record discloses the judge may well have deferred the imposition of sentence only temporarily for the purpose of securing further data which he deemed requisite to the imposition of the sentence. If the suspension were for that purpose, or for any other purpose reasonably necessary in the administration of justice, it would, as the cases above cited

[10] This order (R. 2) was on a printed form, as shown by the photostatic copy thereof appearing in petitioner's brief. The words "Ordered that the prisoner be discharged from the custody of the U. S. marshal" were part of the printed form. The words "Deft. pleads guilty; sentence suspended" were apparently placed upon the form by a rubber stamp.

show, clearly have been valid.[11] In the absence of facts explaining the reason for the suspension of sentence,[12] and in the absence of an affirmative showing that the trial judge intended the suspension to be absolute and permanent, we submit that this Court should presume the facts to have been such as would make the action of the judge valid rather than invalid.

Few presumptions are more firmly established than that as to the regularity and correctness of judicial action and procedure. *Lewis* v. *United States*, 279 U. S. 63, 73; *Nofire* v. *United States*, 164 U. S. 657, 660–661; *Rouda* v. *United States*, 10 F. (2d) 916, 918 (C. C. A. 2d); *Steers* v. *United States*, 192 Fed. 1, 4 (C. C. A. 6th). This is particularly true where the judicial proceedings are attacked collaterally by *habeas corpus*. *United States* v. *Pridgeon*, 153 U. S. 48, 59, 62–63; *Archer* v. *Heath*, 30 F. (2d) 932, 933 (C. C. A. 9th). In the *Pridgeon case* this Court said:

> Under a writ of *habeas corpus* the inquiry is addressed * * * to the question whether

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[11] Where, due to error of the clerk or other official, the records of the court do not correctly reflect the actual facts or order of the trial judge, the court possesses the power at any time to correct its records. *United States* v. *Mayer*, 235 U. S. 55, 67; *Rupinski* v. *United States* 4 F. (2d) 17, 18 (C. C. A. 6th). *United States ex rel Campbell* v. *Bishop*, 47 F. (2d) 95, 96 (C. C. A. 5th).

[12] The fact that petitioner was discharged from the custody of the Marshal is relied upon by the petitioner as indicating that the suspension was permanent. But numerous reasons may have existed which made it unnecessary for the petitioner to be held in custody, especially if he were placed on probation. See pp. 20–21, *infra*.

> the proceedings and the judgment rendered therein are, *for any reason*, nullities, and *unless it is affirmatively shown* that the judgment or sentence, under which the petitioner is confined, is void, he is not entitled to his discharge. (Italics ours.)

Although Federal courts are courts of limited jurisdiction, as to which there is no general presumption of jurisdiction as in the case of courts of general jurisdiction, nevertheless it is settled beyond dispute that once the jurisdiction of a court of limited jurisdiction has attached, every presumption must be indulged in favor of the rightful exercise thereof *until the contrary is affirmatively established.* And where, in a criminal proceeding, jurisdiction is once established, the presumption is that it continues, and the burden is *on the defendant* to show that the court lost jurisdiction to pronounce judgment. *Miller* v. *United States*, 11 Wall. 268, 299; *Harris* v. *Nixon*, 27 App. D. C. 94, 98–99, certiorari denied, 201 U. S. 645; *Stockslager* v. *United States*, 116 Fed. 590, 599 (C. C. A. 9th); *Stuckey* v. *State*, 288 Pac. 394, 395 (Okla. Cr.). See also *In re Cooper*, 143 U. S. 472, 506; *Lamp Chimney Co.* v. *Brass & Copper Co.*, 91 U. S. 656, 661; *State* v. *Taylor*, 188 Mo. App. 271, 272.

In the case at bar the trial court unquestionably had jurisdiction on December 10, 1930, to impose sentence. If the suspension of sentence on that date was only temporarily for a proper purpose it was valid. In the absence of any showing by petitioner to the contrary, it will be presumed that the

suspension was for a proper purpose and that it was valid. *Harris* v. *Nixon*, 27 App. D. C. 94, 98–99, certiorari denied, 201 U. S. 645; *Miner* v. *United States*, 244 Fed. 422, 424 (C. C. A. 3d), *supra; Gillespie* v. *Walker*, 296 Fed. 330, 333 (C. C. A. 4th), *supra; Musick* v. *United States*, 2 F. (2d) 711, 712 (C. C. A. 3d), *supra; Ex parte Dellan*, 26 F. (2d) 243, 244 (C. C. A. 9th), *supra; Brickey* v. *State*, 148 Ark. 595, 599; *People* v. *Penn*, 302 Ill. 488, 495; *State* v. *Cotterel*, 12 Idaho 572; *State* v. *Friedman*, 98 N. J. L. 577, 579; *Dalton* v. *State*, 6 Okla. Cr. 368.

In the *Miner case, supra*, the court said (p. 424):

> Nor does the court's purpose appear. But every legal intendment favors the notion that it had a purpose and that the purpose was lawful. In fact, we must assume, in the absence of anything in the record to the contrary, that the postponements were made for a lawful purpose in the orderly progress of the case. This being true, the validity of the orders postponing sentence is established, leaving for decision no question of the court's jurisdiction to impose sentence at a later term.

The petitioner seeks to distinguish certain of the cases just above cited on the ground that in those cases the suspensions of sentence, although granted for reasons or upon conditions unknown, were to a definite term or date in the future (the suspensions in the *Brickey, Cotterel, Friedman*, and *Dalton cases, supra*, were indefinite as to time), and he states (Br. p. 9):

> If the record shows that the postponement was in terms to a definite time, it will clearly be presumed that the judge had proper reasons therefor. But * * * when the record shows that the suspension was by its terms indefinite, no presumption can change the record fact.

This assertion, unaccompanied by argument in its support, illustrates clearly petitioner's misconception of the *Killits case*. The test of validity of a suspension of sentence as enunciated in that case is not whether the suspension is to a definite time or term,[13] but whether it is permanent or absolute; i. e., whether it amounts to "an absolute and permanent refusal to impose * * * any sentence whatever." Accordingly, a suspension of imposition of sentence is not invalid merely because the postponement is not to a definite date. And conversely, a suspension of sentence beyond the term even if to a definite date is invalid if it is for an improper purpose. *State* v. *Sapp*, 87 Kan. 740, 744; *People* v. *Penn*. 302 Ill. 488, 494–495, *supra*. As the court in the latter case said (pp. 494–495):

> Whether a postponement is rightful depends not upon its length or definiteness, nor upon whether it extends beyond the term, but upon its purpose and character.

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[13] There, as a matter of fact, the suspension was for a definite time since the case was expressly kept open for five years. The Court consistently used the word "permanent" in referring to the type of suspension held to be beyond the power of Federal judges; at no place in its opinion did the Court describe such suspension as an "indefinite" suspension.

The fact that the suspension is not to a definite date is important only because it may be evidence, when considered with all the facts, that the judge intends the suspension to be permanent, that is, to operate as a pardon or reprieve. The fact that the suspension is to a definite date may or may not indicate that the judge intends the suspension to operate in an unlawful manner; since by continuing the case from term to term, as petitioner says may lawfully be done, the statutory duty may be ignored indefinitely and permanently. Obviously the purpose and the purpose alone must characterize the validity of the court's action.

It follows that "indefinite" suspensions are not interdicted in the *Killits case* if indefiniteness of time alone is meant. In its broader sense "indefinite" suspension means permanent suspension without purpose other than that there shall be no sentence at any time. Such was the suspension held unlawful in the *Killits case*. Thus it may truly be said that a suspension for a definite and lawful purpose though indefinite in time is not indefinite in any sense which can offend the law. Accordingly, there is no reason why the presumption of validity which is applied, as the petitioner says correctly, in cases where the suspension is to a definite date should not apply to cases where the suspension is not to a definite date since a lawful purpose is to be presumed in all cases unless the contrary appears.

The petitioner cites *United States* v. *Wilson*, 46 Fed. 748 (C. C. D. Idaho); *Ex parte Singer*, 284 Fed.

60 (C. C. A. 3d); *Mintie* v. *Biddle*, 15 F. (2d) 931 (C. C. A. 8th), and certain State decisions (Br. p. 9) as authority for the proposition that the order of December 10, 1930, was "an indefinite or permanent" suspension of sentence. While expressions in certain of these cases lend support to petitioner's argument, we believe examination will disclose that in most of them the court—from all the facts before it, including the order itself—reached the conclusion that the suspension in question was intended to be "permanent" within the meaning of the *Killits case*. If such conclusion was warranted, the cases are not inconsistent with the argument of the respondent in the case at bar. If these cases, or any of them, hold that every suspension of sentence which is indefinite in point of time is void, we submit that they are inconsistent with *Ex parte United States* and, for reasons above stated, are erroneous.[14]

B. THE SUSPENSION OF SENTENCE UNDER THE FEDERAL PROBATION ACT

Even if the suspension of sentence was invalid under *Ex parte United States*, we contend that it was valid under the subsequently enacted Federal Probation Act, which appears in the appendix to peti-

[14] We can not accept the holding in the opinion of the court below, based, erroneously we think, upon the *Killits case*, that the order of December 10, 1930, was void. (R. 7.) The decision of that court is nevertheless correct for reasons set forth under Point II, pp. 26–37, *infra*.

tioner's brief. That Act gives to the United States District Courts the power

> *to suspend the imposition or execution of sentence* and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best. * * * (Italics ours.)

Although the statute expressly gives the trial court power to suspend the imposition of sentence, the petitioner contends that the suspension here was invalid because the judge did not purport to act under the statute, i. e., because, after suspending sentence, the judge did not place the defendant upon probation for a fixed period and upon specified conditions as, it is asserted, is contemplated by the statute.

The first answer to this contention is that it does not affirmatively appear from the record that petitioner was not placed upon probation. While, concededly, it does not appear that he was, it does not appear *that he was not.* Nor is it alleged in the petition for a writ of *habeas corpus* that he was not placed upon probation. It is fairly to be presumed, in the absence of any showing to the contrary, that upon the suspension of sentence the petitioner was placed upon probation, discharged from the custody of the Marshal, and told by the judge that he was on his good behavior, but that a complete minute of the order was not entered by the clerk upon the court records. If these were the facts, the action of the trial judge was, concededly, within the powers con-

ferred by the statute.[15] Keeping in mind that this proceeding was for a writ of *habeas corpus* to discharge the petitioner from custody under a commitment, valid upon its face, of a court having jurisdiction upon a plea of guilty to an indictment the validity of which is not questioned, and that such proceedings import and are supported by every presumption of validity, we submit that, in the absence of an affirmative showing by petitioner that he was not placed upon probation, this Court should presume the facts to be such as would make the order of suspension valid rather than invalid. (*United States* v. *Pridgeon*, 153 U. S. 48, 59, 62–63, *supra*, and cases at pp. 14–16, *supra*.)

Even if no presumption be indulged, we contend that the order was valid under the Probation Act. By Section 1 of the Act the court is expressly given the power "to suspend the imposition * * * of sentence," and by Section 2 the court is given power to revoke "the suspension of sentence" at any time "within the maximum period for which the defendant might originally have been sentenced" even though "the probation period" has expired. Thus in certain

[15] Where it appears that the defendant is placed upon probation pursuant to conditions orally stated by the judge, it is immaterial that these conditions do not appear in the formal order suspending the sentence. *United States* v. *Mulligan*, 48 F. (2d) 93, 94 (C. C. A. 2d); *Commonwealth* v. *McGovern*, 183 Mass. 238; *People* v. *Trombly*, 173 App. Div. 497. The trial court possesses the power at any time to correct its records to show that probation was granted. *United States ex rel. Campbell* v. *Bishop*, 47 F. (2d) 95, 96 (C. C. A. 5th) *supra*; *Campbell* v. *Aderhold*, 36 F. (2d) 366, 367 (N. D. Ga.).

cases there may be a suspension of sentence under the Probation Act which is not necessarily connected with a formal probation. Accordingly, in view of the wide discretion necessarily vested in the trial court in the administration of the statute (*Burns* v. *United States*, No. 378, present term, decided Dec. 5, 1932), we think that any suspension of sentence must be upheld under the statute unless it appears affirmatively that the suspension violates some express provision of the Act or is clearly for a purpose inconsistent with the known objects of the Act.

Almost the precise situation here presented was presented in *Ex parte DeAngelo*, 50 F. (2d) 847 (C. C. A. 6th). It was there held that the trial judge, who deferred sentence without designation of a specific time for sentence, could, at a subsequent term, eliminate the suspension and sentence the defendant. The court said (p. 848):

> Granted that in the instant case the sentencing judge did not specifically indicate that the postponement of sentence was a suspension of its imposition under the Probation Law. We are dealing with the question of judicial power. If what the court did, by whatever name it may be called, operated as a suspension of the imposition of sentence, it was clearly within the power of the court to do it. * * *[16]

[16] An apparent intimation to the contrary in *Hodges* v. *United States*, 35 F. (2d) 594, 595 (C. C. A. 10th), is, we submit, based upon a construction of the Federal Probation Act which is opposed to its interpretation by this Court in *Burns* v. *United States*, *supra*.

Apparently the same view of the statute was taken in *Campbell* v. *Aderhold*, 36 F. (2d) 366, 367 (N. D. Ga.), *supra*. See also *Finer* v. *Commonwealth*, 250 Mass. 493; *Commonwealth* v. *McGovern*, 183 Mass. 238, *supra*. Cf. *People* v. *Penn*, 302 Ill. 488, 496, *supra*.

Even if an order suspending sentence under the Probation Act should properly contain a reference to a stated period and terms of probation, no difficulty arises from the fact that in the case at bar the order merely suspended sentence. Cases have arisen under the Federal Probation Act and State Probation Acts similar to the Federal statute, where the order of the court merely suspended the sentence and placed the defendant upon probation without specifying any period of probation or terms thereof. As to such a situation the court in *Campbell* v. *Aderhold*, 36 F. (2d) 366, 367, *supra*, said:

> If there is a general probation granted and an omission to fix at the time, verbally or in the judgment, the terms and conditions of probation, these can be added or altered at any time to save the probation from failure. * * *

So far as the period of probation in such cases is concerned, some courts have held that the statute itself operates to fix the period as the maximum period for which probation might have been granted. *People* v. *Patton*, 221 N. Y. 409, 411–414; *Richardson* v. *Commonwealth*, 131 Va. 802, 813; *People* v. *Page*, 125 Misc. Rep. 538, 541.

Obviously the omission is purely formal unless a permanent suspension was intended. If the de-

fendant was in any way prejudiced by the form of his suspension of sentence he should have asked for a resettlement of the order and should not now be heard to question its validity in *habeas corpus* proceedings after it has been revoked and sentence has been imposed. (See footnote 20, p. 30, *infra*.)

From the cases cited it would seem to follow that when a United States District Judge suspends sentence for an indefinite period and nothing appears as to the purpose of the suspension, the effect of the statute is automatically to place the defendant upon probation for such time, not exceeding the statutory limitation of five years,[17] as the court shall remain satisfied that the ends of justice and the best interests of the public and of the defendant are being subserved thereby. Such a conclusion has in substance been reached with respect to the Pennsylvania Probation Act, which is closely similar to the Federal Act. *Commonwealth ex rel. Wilhelm* v. *Morgan*, 278 Pa. 395. In that case the court said (p. 398):

> In our opinion every suspension of sentence since the effective date of the Act of 1911 is subject to its provisions, without regard to the form of the order.

See also *In re Giannini*, 18 Cal. App. 166.

This conclusion is wholly consistent with and, we think, is suggested if not required by the interpretation of the scope and purpose of the Federal Proba-

[17] In the instant case this period is coterminous with the maximum period of imprisonment to which petitioner could have been sentenced for the offense of which he was convicted. See footnote 1, p. 3, *supra*.

tion Act recently enunciated by this Court. In *Burns* v. *United States*, No. 378, present term, decided Dec. 5, 1932, *supra*, this Court said:

> The Federal Probation Act * * * confers an authority commensurate with its object. * * * Probation is thus conferred as a privilege and can not be demanded as a right. It is a matter of favor, not of contract. There is no requirement that it must be granted on a specified showing. The defendant stands convicted; he faces punishment and can not insist on terms or strike a bargain. To accomplish the purpose of the statute, an exceptional degree of flexibility in administration is essential. It is necessary to individualize each case, to give that careful humane and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion. The provisions of the Act are adapted to this end. * * *

With respect to the absence of limitations upon the grant and revocation of probation the Court said:

> No criteria for modification or revocation are suggested which are in addition to, or different from, those which pertain to the original grant. The question in both cases is whether the court is satisfied that its action will subserve the ends of justice and the best interests of both the public and the defendant. The only limitation, and this applies to both the grant and any modification of it, is that

> the total period of probation shall not exceed five years. * * *

Although sentence has been suspended, the defendant—

> is still a person convicted of an offense, and the *suspension of his sentence remains within the control of the court.* * * * (Italics ours.)

The opinion in the *Burns case* makes it clear that upon conviction the defendant "faces punishment and can not insist upon terms or strike a bargain"; that in the matter of revoking probation the court is not limited by the terms and conditions upon which probation may have been granted, and that regardless of such terms it may revoke a probation, as it may grant it, whenever satisfied that the ends of justice will be subserved. Accordingly, we submit that even if the trial judge when suspending sentence did not formally state that he was placing the petitioner upon probation the suspension was nevertheless valid as a proper exercise of the judge's power under the statute.

It follows that the order of December 10, 1930, was a valid order. If the sentence was suspended only temporarily for a purpose incident to the imposition of the sentence, it was valid wholly apart from any statute. If the suspension be regarded as permanent, then it must be held to have been made under and to be limited by the Federal Probation Act. Since the validity of the judgment of June 17, 1931, and, there-

fore, of the commitment under which petitioner is held by the respondent, follows necessarily from either of these conclusions, this Court, we submit, should not presume a state of facts, *not affirmatively shown to have existed*, inconsistent with both of such conclusions.

II

EVEN IF THE ORDER SUSPENDING THE IMPOSITION OF SENTENCE WAS VOID, SENTENCE WAS LAWFULLY IMPOSED AT A SUBSEQUENT TERM

The petitioner contends that if the order of December 10, 1930, was invalid, which we now assume, the trial court upon the expiration of the term lost jurisdiction thereafter to sentence him. Concededly, *United States* v. *Wilson*, 46 F. (2d) 748 (C.C.D. Idaho); *Ex parte Singer*, 284 Fed. 60 (C. C. A. 3d); *Mintie* v. *Biddle*, 15 F. (2d) 931 (C. C. A. 8th), all hereinbefore cited, and certain State cases (Pet. Br. 15) support this contention. These decisions, we submit, are erroneous. They are all apparently based upon the theory that an indefinite, permanent suspension of sentence operates, upon the expiration of the term, as an abandonment of the prosecution and a discharge of the defendant. No adequate reason for this extraordinary result may, we believe, be found in any of the cases cited. Both logically and historically such result is indefensible. The correct view is, we submit, that of those cases which hold, as did the court below, that an invalid suspension of the *impo-*

sition [18] or execution [19] of a sentence does not deprive the court of jurisdiction at a later term to impose or enforce the sentence. Cf. *Ex parte De Angelo*, 50 F. (2d) 847, 848 (C. C. A. 6th), *supra*.

The petitioner regards as inapplicable to the case at bar those cases above cited which permit the trial court *after the term* to revoke an invalid order suspending the *execution* of sentence. But no adequate reason has been suggested, and we believe none exists, why the basis of such decisions is not fully applicable to the case where *imposition* of sentence has been unlawfully suspended. The ground of such

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[18] *Hancock* v. *Rogers*, 140 Ga. 688; *Ex parte Dunn*, 50 S. D. 48, 52–53; *Hoggett* v. *State*, 101 Miss. 269. See also *Campbell* v. *Aderhold*, 36 F. (2d) 366, *supra*, and cf. *Taylor* v. *Walker*, 6 F. (2d) 577 (C. C. A. 4th, *supra*). These cases refute the statement of petitioner (Br. pp. 11, 14) that those courts which follow the *Killits case* are "uniform" in holding that the trial court loses jurisdiction after the term to impose a sentence which has been invalidly suspended. Of course, those courts which do not follow the *Killits case* recognize the power of the trial court to impose sentence at a later term. *People* v. *Court of Sessions*, 141 N. Y. 288; *Ex parte St. Hilaire*, 101 Me. 522; *Commonwealth* v. *Dowdican's Bail*, 115 Mass. 133; *Philppot* v. *State*, 65 N. H. 250; *Ex parte Williams*, 26 Fla. 310; see also *State* v. *Drew*, 75 N. H. 402.

[19] *Morgan* v. *Adams*, 226 Fed. 719, 721 (C. C. A. 8th); *United States ex rel Campbell* v. *Bishop*, 47 F. (2d) 95, 96 (C. C. A. 5th); *Tanner* v. *Wiggins*, 54 Fla. 203; *Reese* v. *Olsen* 44 Utah 318; *Spencer* v. *State*, 125 Tenn. 64; *Fuller* v. *State*, 100 Miss. 811; *Miller* v. *Evans*, 115 Iowa, 101; *Brabandt* v. *Commonwealth*, 157 Ky. 130; *Neal* v. *State*, 104 Ga. 509; *State* v. *Abbott*, 87 S. C. 466.

decisions (see footnote 19, p. 28, *supra*) is that if the order suspending the execution of sentence is illegal, it is so because it is beyond the power of the court, and therefore void; but the sentence is valid, and, being separable from the void order of suspension, is enforceable by the court at any time, either within or after the term. And so in the instant case, if the order of suspension was invalid, nevertheless the *conviction* was authorized and valid, and no reason appears why the trial court should not have power to impose the statutory penalty after the term.

This conclusion is supported, and indeed, we think, required by principles frequently announced and applied by this Court. In the *Killits case* the Court held "that the right to relieve from the punishment, fixed by law and ascertained according to the methods by it provided, belongs to the executive department," and that, in the absence of a statute providing otherwise, the courts of the United States upon the conviction of a defendant have no discretion but to impose the punishment provided by law. The same principle was recently reaffirmed in *Sorrells* v. *United States*, No. 177, present term, decided December 19, 1932, and in *Ex parte United States*, No. 19, Original, present term, decided December 5, 1932. Accordingly after a verdict or plea of guilty the judge is under a duty to impose sentence and enforce the statutory penalty. He may suspend the imposition of sentence temporarily for a purpose incident to the imposition thereof, or he may suspend it for a definite period or

indefinitely under the Federal Probation Act. But failing to do either of these things, which the petitioner contends is the situation in the instant case, the duty remains, as petitioner himself vigorously contends (Br. pp. 24, 25, 28), to impose the sentence. If he fails to perform that duty he may be compelled, under the rule of the *Killits* and other cases, to do so by mandamus. *Rachmil* v. *United States*, 288 Fed. 782, 785 (C. C. A. 2d), certiorari denied, 262 U. S. 751; *Turner* v. *Commonwealth*, 209 Ky. 272, 275; *State* v. *Shea*, 95 Mo. 85, 90–91. See also *Ex Parte United States*, No. 19, Original, present term, *supra*. It necessarily follows that the judge may voluntarily do what he might be compelled to do by mandamus.

The foregoing makes clear, we think, the necessary inconsistency in and the circuitous path of the argument of the petitioner. He argues first that an indefinite, permanent suspension of sentence is invalid because it is tantamount to a refusal on the part of the judge to enforce the law; and in discussing the Federal Probation Act, he states that a United States District Court has no more power now than it had before that Act "to refuse to enforce the law." Then, swiftly forgetting his apparent desire that the judge should not be permitted to refuse to impose the statutory penalty, he contends that after the expiration of the term in which the invalid order was made the judge has lost his power to impose the sentence which he should have imposed, because he refused to

impose it when he should have done so.[20] Thus, either by innocent mistake or wilful error (i. e., in attempting to suspend the sentence in a manner beyond his power), he is permitted, under petitioner's argument, to accomplish indirectly that which he is wholly without authority to do directly. This point is well stated in *Ex parte Dunn*, 50 S. D. 48, *supra*, where the court, rejecting the view of the cases relied upon by the petitioner, said (pp. 52–53):

> * * * the weakness of that view seems apparent. It amounts to saying that the court may not infringe upon the prerogative of the Governor by attempting to pardon one convicted of crime, but, if a court postpones pronouncing of judgment in such manner as to be equivalent to a pardon, the court loses jurisdiction to sentence, and the defendant must go free; thus allowing the court to accomplish by mere error what it is denied the power to do by direct act.

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[20] It should be borne in mind that the petitioner made no objection, so far as the record discloses, to the order suspending the imposition of sentence, and never took steps to have it set aside. After accepting the benefits of the suspension we submit he should not now be permitted to use the order of suspension as the basis for escaping all liability for the statutory penalty. *Finer* v. *Commonwealth*, 250 Mass. 493, 497, *supra; Hoggett* v. *State*, 101 Miss. 269, *supra; Dalton* v. *State*, 6 Okla. Cr. 368, *supra*. If he had a right to an immediate sentence he waived it by consenting to the suspension. *United States* v. *Mulligan*, 48 F. (2d) 93, 94 (C. C. A. 2d), *supra*. If he waives the delay in pronouncing sentence he may not contend that the court lost jurisdiction to pronounce sentence at a later term. *People* v. *Penn*, 302 Ill. 488, 495–496, *supra*.

No impediment to the result for which we contend arises from the fact that the sentence in the case at bar was imposed at a term subsequent to the one in which it was, so petitioner alleges, invalidly suspended. In *United States* v. *Mayer*, 235 U. S. 55, *supra*, it was held that upon the expiration of the term of court in which its *final* order or judgment was entered the trial court loses jurisdiction of the case, unless proceedings to set aside or alter such order or judgment are begun during that term. It logically follows, and the cases hold, that until a *final* order or judgment has been entered the trial court retains jurisdiction of the case, and the case is regarded as pending from term to term without any formal order of continuance. *Rachmil* v. *United States*, 288 Fed. 782, 785 (C. C. A. 2d), certiorari denied, 262 U. S. 751, *supra; Hammers* v. *United States*, 279 Fed. 265, 266 (C. C. A. 5th); *Taylor* v. *Walker*, 6 F. (2d) 57 (C. C. A. 4th), *supra; Commonwealth* v. *Dowdican's Bail*, 115 Mass. 133, 136, *supra; Neace* v. *Commonwealth*, 165 Ky. 739, 743; *Hoggett* v. *State*, 101 Miss. 269, *supra; Dilley* v. *Commonwealth*, 243 Ky. 464. Cf. *Goddard* v. *Ordway*, 101 U. S. 745, 751; *United States* v. *Bishop*, 39 F. (2d) 208, 209 (S. D. Fla.), aff'd, 47 F. (2d) 95 (C. C. A. 5th).

So far as Federal courts are concerned the above conclusion would seem necessarily to follow from Section 8 of the Judicial Code (U. S. C., Title 28, Sec. 12) which provides:

> When the trial or hearing of any cause, civil or criminal, in a district court has been

> commenced and is in progress before a jury or the court, it shall not be stayed or discontinued by the arrival of the time fixed by law for another session of said court; but the court may proceed therein and bring it to a conclusion in the same manner and with the same effect as if another stated term of the court had not intervened.

The effect of this provision has been expressly or impliedly recognized and applied by the Federal courts. *Kalmanson* v. *United States*, 282 Fed. 619, 620 (C. C. A. 2d); *Walker* v. *Moser*, 117 Fed. 230 (C. C. A. 8th); *G. Amsinck & Co.* v. *Springfield Grocer Co.*, 7 F. (2d) 855 (C. C. A. 8th). In the last cited case the court said (p. 858):

> If it was not a final judgment, then the case remained on the docket, and the court would have the power at the next term, in the exercise of its judicial discretion, to reopen the case for the purpose of receiving newly discovered evidence, or any other purpose consonant with justice and a correct decision, * * *.

In a criminal case the final order or judgment is the sentence. *People* v. *Bork*, 78 N. Y. 346. Accordingly, in such a case the prosecution is not complete and the court does not lose jurisdiction until the entry of a valid sentence. *Rachmil* v. *United States*, 288 Fed. 782, 785 (C. C. A. 2d), certiorari denied, 262 U. S. 751, *supra; Hammers* v. *United States*, 279 Fed. 265 (C. C. A. 5th), *supra*. In the latter case the court said (p. 266);

> The case is to be regarded as pending until it is finally disposed of by the imposition of a lawful sentence.

An order suspending the imposition of sentence is not the sentence, nor is it a final, appealable order. *United States* v. *Lecato*, 29 F. (2d) 694, 695 (C. C. A. 2d); *People* v. *Bork*, 78 N. Y. 346, 350, *supra; State* v. *Bougiorno*, 96 N. J. L. 318; *Symington* v. *State*, 133 Md. 452; *State* v. *Vaughan*, 71 Conn. 457. See also *Commonwealth* v. *Carver*, 224 Mass. 42; *Hill* v. *People*, 10 N. Y. 463. *A fortiori* an invalid order suspending the imposition of sentence is not a final order. If the order of December 10, 1930, suspending the imposition of sentence was void, then no *final* order was entered by the trial court until the sentence of June 17, 1931. Accordingly, under firmly established principles, sentence was imposed at a time when the court retained full jurisdiction of the case.

This conclusion is sustained by the decisions of this and other courts in closely analogous situations. It is well settled that where a defendant has been imprisoned pursuant to a sentence which for any reason is void, and he thereafter secures his release upon *habeas corpus*, the proper procedure for the court granting the writ is to remand the defendant to the court which imposed the void sentence in order that a valid sentence may be imposed. That the term of court in which the original judgment was rendered has expired does not defeat the jurisdiction of that court to impose a valid sentence. *In re Bonner*, 151 U. S. 242, 260–261; *Bryant* v. *United States*, 214 Fed. 51, 53–54 (C. C. A. 8th); *Rogers* v. *Desportes*, 268 Fed. 308 (C. C. A. 4th); *Hammers* v. *United States*, 279 Fed. 265, 266 (C. C. A. 5th), *supra; United States* v. *Mathues*, 9 F. (2d) 913, 194 (C. C. A. 3d); *Biddle* v.

Thiele, 11 F. (2d) 235, 237 (C. C. A. 8th); *State* v. *Reed*, 138 Minn. 465, 467. Cf. *Coleman* v. *Tennessee*, 97 U. S. 509, 519–520; *United States* v. *McBratney*, 104 U. S. 621, 624; *Medley, Petitioner*, 134 U. S. 160, 174; *Mahler* v. *Eby*, 264 U. S. 32, 46.

In *In re Bonner*, 151 U. S. 242, *supra*, the Court quoted with approval the following statement of the Supreme Court of Pennsylvania (p. 260):

> The common law embodies in itself sufficient reason and common sense to reject the monstrous doctrine that a prisoner, whose guilt is established, by a regular verdict, is to escape punishment altogether, because the court committed an error in passing the sentence. If this court sanctioned such a rule, it would fail to perform the chief duty for which it was established.

No reason is discernible why jurisdiction of the trial court should continue after the term in the case of a *void sentence* and not in the case of an *invalid suspension of sentence*.[21] Historically there is more basis for asserting the loss of jurisdiction in the *former* case since in such case the court has entered what purported to be its final order or judgment.

The result for which we contend follows all the more clearly in view of the Federal Probation Act. That statute expressly gave the trial judge power to

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[21] The petitioner argues that a defendant is entitled to at least a "modicum of consideration" and that it is unfair to hold the threat of imposition of sentence over a convict indefinitely. This difficulty is more fanciful than real since the defendant "may at any time insist upon the imposition of sentence." *United States* v. *Lecato*, 29 F. (2d) 694, 695 (C. C. A. 2d), *supra*.

suspend the imposition of sentence. If his order of December 10, 1930, was void under that statute it was void only because he failed to place the petitioner upon probation. To the extent that the order suspended the imposition of sentence, it was clearly authorized by the statute, and under well established principles the order to that extent should be sustained. *United States* v. *Pridgeon*, 153 U. S. 48, 62; *United States ex rel. Campbell* v. *Bishop*, 47 F. (2d) 95, 96 (C. C. A. 5th); *In re Giannini*, 18 Cal. App. 166, 169, all hereinbefore cited. If, after the term, the judge desires to make his order more definite or to add to it a grant of probation, there is nothing in the Probation Act to deter him. It is significant that at any time up to the beginning of the service of sentence it may be suspended under the Probation Act, even though the term has expired. *United States* v. *Levy*, 49 F. (2d) 811 (W. D. Wash.). Cf. *United States* v. *Murray*, 275 U. S. 347.

In the *Killits case* this Court was confronted with the argument that if it should fail to sustain the asserted right of Federal courts indefinitely and permanently to suspend sentence great hardship would result to many persons then at large upon suspended sentences. While conceding that this argument presented "a grave situation," the Court said (p. 52):

> But we are admonished that no authority exists to cure wrongs resulting from a violation of the Constitution in the past, however meritorious may have been the motive giving rise to it, by sanctioning a disregard of that instru-

> ment in the future. On the contrary, so far as wrong resulting from an attempt to do away with the consequences of the mistaken exercise of the power in the past is concerned, complete remedy may be afforded by the exertion of the pardoning power; * * *

These statements leave no room for doubt that in the opinion of this Court those Federal courts which, acting beyond their authority, had ordered sentences suspended, nevertheless retained jurisdiction regardless of the expiration of the term, to set aside their void orders and to impose the punishment provided by law.

CONCLUSION

The contentions of the petitioner are founded solely upon technical irregularities in the trial proceedings. We think that the Court should be slow to permit an admittedly guilty convict to escape the statutory penalty because of what in all likelihood was an inadvertence on the part of the clerk of the trial court.

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES.

No. 138.—October Term, 1932.

Joseph F. Miller, Petitioner, *vs.* A. C. Aderhold, Warden, United States Penitentiary, Atlanta, Georgia.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[February 6, 1933.]

Mr. Justice Sutherland delivered the opinion of the Court.

December 10, 1930, in the federal district court for the southern district of New York, petitioner was convicted on his plea of guilty of the crime of stealing from the United States mails. By order of the court, sentence was suspended and he was discharged from the custody of the marshal.

At a subsequent term of court, on June 17, 1931, petitioner was sentenced by another judge to four years imprisonment. A motion to vacate the sentence was denied; and a petition for a writ of *habeas corpus* was filed in the federal district court for the northern district of Georgia, praying the discharge of petitioner on the ground that the court imposing the sentence was without jurisdiction to do so. After a hearing the writ was dismissed and petitioner remanded to custody. The circuit court of appeals affirmed the judgment. 56 F. (2d) 152.

Petitioner seeks a reversal here on the ground that the order of December 10 constitutes a permanent suspension of sentence, void under the decision of this court in *Ex parte United States,* 242 U. S. 27; and that with the expiration of the term the trial court was without power to sentence petitioner. The Solicitor General vigorously opposes the contention that the effect of the order was to suspend sentence permanently; but, without determining that question, we are of opinion that if such was the effect, nevertheless, the court was not deprived of power to impose sentence at a subsequent term.

The decisions on the point are in conflict. The greater number support the view of petitioner; but we are of opinion that the weight of reason is the other way. Several of the cases holding

with petitioner are set forth in *Mintie* v. *Biddle*, 15 F. (2d) 931. While these cases and others are emphatically to the effect that a permanent suspension of sentence is void, and that the court thereby, with the passing of the term, loses jurisdiction, we find no convincing reason in any of them for the latter conclusion. The decision in the *Mintie* case rests primarily upon considerations affecting the accused. Support for its conclusion is found by the court in the supposition that during the suspension the accused can "make no plans, enter into no contracts, engage in no permanent occupation, and bind himself to no obligations, or create any permanent ties, business or domestic." But it is hard to see the relevancy of these difficulties to the question of jurisdiction. They equally would be present if sentence were definitely postponed from term to term; and power to that extent is not doubted. Moreover, since the suspension order is void, the accused is not bound to rest under the supposed hardship. He may at any time put an end to it by requesting the court to pronounce judgment, which the court no doubt would do unless good cause to the contrary were made to appear. In the absence of such request he must be held to have consented to the indefinite delay and cannot complain. *Hoggett* v. *State*, 101 Miss. 269, 271. Compare *United States* v. *Mulligan*, 48 F. (2d) 93; *United States* v. *Lecato*, 29 F. (2d) 694, 695.

In a criminal case final judgment means sentence; and a void order purporting permanently to suspend sentence is neither a final nor a valid judgment. *United States* v. *Lecato, supra*, at p. 695; *State* v. *Bongiorno*, 96 N. J. L. 318; *People* v. *Bork*, 78 N. Y. 346, 350; *State* v. *Vaughan*, 71 Conn. 457, 458; *Symington III* v. *State*, 133 Md. 452, 454. If the suspension be for a fixed time, the case undoubtedly remains on the docket of the court until disposed of by final judgment. There is no good reason, in our opinion, why a different rule should obtain where the order of suspension, though expressly made permanent, is void. Such an order is a mere nullity without force or effect, as though no order at all had been made; and the case necessarily remains pending until lawfully disposed of by sentence. Compare *In re Bonner*, 151 U. S. 242, 259-262; *G. Amsinck & Co.* v. *Springfield Grocer Co.*, 7 F. (2d) 855, 858; *Hammers* v. *United States*, 279 Fed. 265, 266; *Biddle* v. *Thiele*, 11 F. (2d) 235, 236-237; *Bryant* v. *United States*, 214 Fed. 51.

The order here under review being ineffectual to confer immunity from punishment, the conclusion that such immunity existed must rest upon the bare fact that, without any saving provision, the term at which the accused was convicted but not sentenced had passed. But that foundation for the conclusion at once vanishes in the face of the rule that where judgment has not been pronounced upon a verdict during the term at which it was rendered, the cause continues on the docket and necessarily passes over to a succeeding term for final judgment or other appropriate action. *Walker* v. *Moser,* 117 Fed. 230, 232. We conclude, in accordance with what we regard as the better view, that in a criminal case, where verdict has been duly returned, the jurisdiction of the trial court, under circumstances such as are here disclosed, is not exhausted until sentence is pronounced, either at the same or a succeeding term. *Rachmil* v. *United States,* 288 Fed. 782, 785; *Ex parte Dunn,* 50 S. D. 48, 52-54; *Hoggett* v. *State, supra,* at p. 271; *Hancock* v. *Rogers,* 140 Ga. 688; *Dilley* v. *Commonwealth,* 243 Ky. 464, 468; *Neace* v. *Commonwealth,* 165 Ky. 739, 742-743.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.